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United States
Circuit Court of Appeals

For the Ninth Circuit.

ELECTRICAL RESEARCH PRODUCTS, INC.,
a corporation,

Appellant,

vs.

W. D. GROSS,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 528


Upon Appeal from the District Court of the United
States for the Territory of Alaska
Division Number One

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PAUL S. O'BRIEN

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No. 8044

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Circuit Court of Appeals

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Complaint as Amended (by Interlineation)	1
Exhibit 1—Itemized statement of installation charges for Coliseum Theatre, Juneau	18
Exhibit 2—Itemized statement of installation charges for Coliseum Theatre, Ketchikan	19
Amended Answer	20
Exhibit 2—Agreement dated September 4, 1929, alleged modification of Agreement between Electrical Research Products, Inc., and W. D. Gross dated March 28, 1929 re Coliseum Theatre at Juneau	27
Exhibit 4—Agreement dated September 4, 1929, alleged modification of agreement between Electrical Research Products, Inc., and W. D. Gross dated March 28, 1929 re Coliseum Theatre at Ketchikan	54

	Index	Page
Appeal:		
bond on		164
citation on		166
order allowing		162
order approving		166
petition for		162
Assignment of Errors.....		128
Bill of Exceptions, and Order Allowing It.....		168
Court's instructions to the Jury.....		980
Exhibits for defendant:		
A—Demand for admittance to instru- ment for the purpose of disconnect- ing equipment		696
B—Plaintiff's advertisement in "Ex- hibitors Herald-World" dated Sep- tember 6, 1930.....		282
C—Plaintiff's advertisement in "Ex- hibitors Herald-World" dated De- cember 27, 1930.....		284
E—Check dated Juneau, Alaska, April 2, 1930 issued to Electrical Research Products, Inc., signed Coliseum Theatre by W. D. Gross, Manager.....		326
F-1 and F-2—Two checks dated Ju- neau, Alaska, December 30, 1929 for service to Juneau and Ketchikan, respectively, issued to Electrical Re-		

Index	Page
search Products, Inc., signed Coliseum Theatre, Juneau by W. D. Gross, Manager	328
F-3—Letter dated February 10, 1930, W. D. Gross to Mr. Gage.....	329
F-4—Letter dated February 14, 1930, W. D. Gross to Mr. Gage.....	332
F-5—Letter dated March 28, 1930, W. D. Gross to R. H. Pearsall.....	335
F-6—Letter dated June 11, 1930, N. A. Robinson to W. D. Gross.....	337
F-7—Letter dated September 15, 1930, W. D. Gross to Electrical Research Products, Inc.	340
F-8—Bundle of checks and notes between W. D. Gross and Electrical Research Products, Inc. [A sample of each is set out here].....	342
F-9—Letter dated February 7, 1931, R. E. Robertson to W. D. Gross.....	345
F-10—Letter dated March 26, 1931, R. E. Robertson to W. D. Gross.....	349
G—Letter dated August 7, 1929, Electrical Research Products, Inc. to W. D. Gross.....	356
I—Statement showing profit and loss for 1929, Coliseum Theatre, Ketchikan	485

Index	Page
I-1—Statement of profit and loss for 1930, Coliseum Theatre, Ketchikan.....	506
I-2—Statement of profit and loss for 1931, Coliseum Theatre, Ketchikan.....	520
I-3—Statement of profit and loss for 1932, Coliseum Theatre, Ketchikan.....	534
I-4—Statement of profit and loss for 1933, Coliseum Theatre, Ketchikan...	548
I-5—Schedule of capital investment and depreciation reserve for years 1929-1933, Coliseum Theatre, Ketchi- kan	555
I-6—Statement of average monthly profit and loss for Coliseum Theatre, Ketchikan, 1929-1933.....	558
J—Operating statements from May, 1931, to January 1, 1935, Coliseum Theatre, Ketchikan	561
K—Schedule of capital investment and depreciation reserve, Coliseum Theatre, Juneau	575
K-1—Profit and loss statements for 1929, Coliseum Theatre, Juneau.....	578
K-2—Profit and loss statement for 1930, Coliseum Theatre, Juneau.....	598
K-3—Profit and loss statement for 1931, Coliseum Theatre, Juneau.....	614

Index	Page
K-4—Profit and loss statement for 1932, Coliseum Theatre, Juneau.....	631
K-5—Profit and loss statement for 1933, Coliseum Theatre, Juneau.....	647
K-6—Average monthly profit and loss statement, Coliseum Theatre, Juneau	656
L—Profit and loss statements from May 31, 1933 to May 31, 1934, Coli- seum Theatre, Juneau.....	658
N—Three telegrams	677
O—Letter dated September 12, 1929, R. Hilton to W. D. Gross (with en- closure)	680
P—Telegrams between Electrical Re- search Products, Inc. and W. D. Gross	684
Q—Check dated January 1, 1930, signed "Coliseum Theatre, by Mrs. W. D. Gross, W. D. Gross".....	686
Q-1—Telegram dated Juneau, Alaska, February 3, 1930, Coliseum to R. H. Pearsall	687, 913
R—Two bills rendered by Electrical Research Products, Inc. to Coliseum Theatres at Juneau and Ketchikan...	689
S—Check dated November 1, 1930, Alaska Film Exchange to Electrical Research Products	691

Index	Page
S-1—Letter dated October 23, 1930, K. E. Grant to W. D. Gross.....	691
S-2—Letter dated November 10, 1930, written by Tuckett, signed "Mgr." to Mott, Valee & Grant.....	692
T—Tabulation of cost of new equip- ment	699
U—Bank deposit book with the B. M. Behrends Bank from April 19, 1928 to October 8, 1932.....	767
U-1—Bank deposit book with the Miners and Merchants Bank from January 2, 1931 to May 12, 1933.....	778
U-2—Bank deposit book with the B. M. Behrends Bank from October 6, 1932 to August 14, 1933.....	781
V—Undated letter, Lemieux to Elec- trical Research Products, Inc.....	807
W—Averages as per Shearer's reports —Coliseum Theatre—Ketchikan.....	787
W-1—Averages as per Shearer's re- ports—Coliseum Theatre—Juneau.....	789
W-2—Statement of loss from June 1, 1929 to May 1, 1931 and from May 1, 1931 to May 1, 1933—Coliseum Theatre, Ketchikan	791
W-3—Statement of loss from May 1. 1929 to May 1, 1931 and from May 1, 1931 to May 1, 1933.....	794

Index

Page

Exhibits for plaintiff:

No. 1—Agreement dated March 28, 1929 between Electrical Research Products, Inc., and W. D. Gross re Coliseum Theatre at Juneau.....	170
No. 2—Agreement dated September 4, 1929 [set out herein at page 27].....	189
No. 6-A—Certified copy of resolution of Electrical Research Products, Inc. adopted June 14, 1927.....	191
No. 6-B—Certified copy of resolution of Electrical Research Products, Inc. adopted May 25, 1927.....	193
No. 25—List of spare parts furnished to theatre at Juneau.....	303
No. 26—List of spare parts furnished to theatre at Ketchikan.....	304
No. 27—List of free replacements.....	306
No. 28—Certified copies of United States Marshal's returns to writs of replevin	311
No. 29-A—Statement showing profit from Capitol Theatre at Juneau for November and December, 1934.....	368
No. 29-B—Statement showing profit from Coliseum Theatre at Juneau for November and December, 1934.....	369

Index	Page
No. 30-A—Statement showing profit from Coliseum Theatre at Ketchikan for November and December, 1934.....	370
No. 30-B—Statement showing profit from Revilla Theatre, Ketchikan, for November and December, 1934.....	372
No. 31—Letter dated August 1, 1928, W. D. Gross to Electrical Research Products, Inc.	392
No. 32—Letter dated December 12, 1928, Alaska Film Exchange to Electrical Research Products, Inc.....	396
No. 33—Letter dated November 23, 1928, E. W. Gregg to W. D. Gross.....	405
Nos. 34-A to 34-Y and 35-A to 35-Y—Profit and loss statements.....	409
No. 36—Letter dated February 7, 1929, E. S. Gregg to W. D. Gross.....	433
No. 36-A—Letter dated February 14, 1929, E. S. Gregg to W. D. Gross.....	436
No. 36-B—Letter dated January 22, 1929, W. D. Gross to Electrical Research Products	437
No. 36-C—Letter dated February 14, 1929, W. D. Gross to Electrical Research Products, Inc.....	439
No. 36-D—Letter dated January 6, 1929, W. D. Gross to Electrical Research Products, Inc.....	442

Index	Page
No. 36-E—Letter dated January 22, 1929, E. S. Gregg to W. D. Gross.....	446
No. 37—Telegram dated 1/29/30, R. H. Pearsall to W. D. Gross.....	449
No. 37-A—Letter dated January 30, 1930, Electrical Research Products, Inc. to W. D. Gross.....	450
No. 37-B—Telegram dated March 5, 1930, R. H. Pearsall to W. D. Gross	451
No. 37-C—Telegram dated March 14, 1930, R. H. Pearsall to W. D. Gross	452
No. 37-D—Letter dated April 23, 1930, W. D. Gross to Electrical Research Products, Inc.	453
No. 37-E—Unsigned letter dated May 5, 1930 to W. D. Gross.....	453
No. 37-F—Telegram dated May 21, 1930, R. H. Pearsall to W. D. Gross	455
No. 37-G—Telegram dated May 28, 1930, R. H. Pearsall to W. D. Gross	456
No. 37-H—Telegram dated June 6, 1930, R. H. Pearsall to W. D. Gross	457
No. 37-I—Telegram dated June 14, 1930, R. H. Pearsall to W. D. Gross	457
No. 37-J—Telegram dated April 11, 1930, R. H. Pearsall to W. D. Gross	458
No. 37-K—Telegram dated September 22, 1930, R. H. Pearsall to W. D. Gross	459

Index	Page
No. 38—Letter dated November 1, 1930. W. D. Gross to Electrical Re- search Products, Inc.....	467
No. 39—Letter dated September 15, 1930. W. D. Gross to Electrical Re- search Products, Inc.....	468
No. 40—Letter dated January 28, 1930. Chas. Tuckett to J. S. Briggs.....	751
No. 41—Letter dated February 5, 1930, Chas. Tuckett to J. S. Briggs.....	753
No. 42—Telegram dated July 18, 1930, Coliseum Theatre to R. H. Pearsall	755
No. 43—Income tax return of W. D. Gross for the calendar year 1929 and attached papers	863
No. 44—Income tax return of W. D. Gross for the calendar year 1930 and attached papers	870
No. 45-A—Telegram dated February 4, 1930, P. M. Walker to J. S. Briggs.....	914
No. 45-B—Telegram dated February 4, 1930, J. S. Briggs to E. V. Smith.....	915
No. 45-C—Telegram dated January 17, 1930, Coliseum Theatre, Juneau to Electrical Research Products.....	919
No. 45-D—Telegram dated February 5, 1930 E. V. Smith to J. S. Briggs.....	916

Index	Page
No. 45-E—Telegram dated February 5, 1930, J. S. Briggs to Coliseum Theatre, Juneau	917
No. 46—List of emergency parts for engineers' kits	903
No. 49—Graph of defendant's exhibit series I drawn by James C. Cooper.....	883
No. 49-B—Graph of defendant's exhibit series K drawn by James C. Cooper	884
No. 50—Unsigned letter dated May 20, 1929, addressed to Alaska Film Corp.	932
No. 53—Income tax return of W. D. Gross and wife for calendar year 1932	886
No. 54—Telegram dated November 17, 1929, Coliseum Theatre, Juneau to R. Q. Quinn.....	934
No. 55—Comparative operating statement—Juneau	950
No. 55-A—Comparative operating statement—Ketchikan	955
No. 56—Diagram [not set out].....	945
No. 57—Telegram dated June 13, 1930, Coliseum Theatre to R. H. Pearsall	938
No. 58—Telegram dated March 17, 1930, Chas. Tuckett to R. H. Pearsall	938

Index	Page
Witnesses for defendant:	
Cawthorne, H. E.	
—direct	472
—cross	480
Clayton, E. B.	
—direct	783
—cross	784
Dalner, W. L.	
—direct	832
—cross	834
—redirect	835
—recross	835
Goldstein, I.	
—direct	316
—cross	317
Gross, W. D.	
—direct	317
—cross	367
—redirect	469
—recross	471
—redirect	472
—recalled, surrebuttal direct.....	975
Lemieux, Louis	
—direct	800
—cross	809
—redirect	820
Lemieux, Ned	
—direct	822
—cross	828

Index	Page
Witnesses for defendant (cont'd):	
McKinnon, Lockie	
—direct	821
—cross	822
Mullen, J. F.	
—direct	835
—cross	837
Stabler, Harold L.	
—direct	785
—cross	796
—recalled, sur-rebuttal direct.....	974
Tuckett, Charles M.	
—direct	482
—cross	700
—redirect	711
—recross	760
—re-redirect	764
Depositions for plaintiff:	
Albright, G. I.	
—direct	194
Anderson, Earle R.	
—direct	168
Briggs, J. S.	
—rebuttal, direct	912
Darragh, J. B., Jr.	
—direct	199
—rebuttal, direct	939

Index	Page
Depositions for plaintiff (cont'd):	
Foulon, F.	
—direct	206
—rebuttal, direct	941
—cross	942
Gage, J. A.	
—rebuttal, direct	924
Gilmore, Harry B.	
—rebuttal, direct	962
Hurlburt, H. C.	
—direct	209
—rebuttal, direct	942
Knowlton, Danner	
—direct	196
—rebuttal, direct	939
—cross	939
Little, Robert C.	
—direct	201
—rebuttal, direct	940
Tobey, E. S.	
—direct	204
—rebuttal, direct	940
Witnesses for plaintiff:	
Cooper, James C.	
—rebuttal, direct	854
cross	880
redirect	882

Index	Page
Witnesses for plaintiff (cont'd):	
Kubley, Lawrence	
—rebuttal, direct	839
cross	845
redirect	848
Lawrence, Ralph E.	
—direct	212
—cross	258
—redirect	286
—recross	288
—redirect	289
—recalled, rebuttal, direct	963
cross	972
Levinson, Nathan	
—direct	962
Mather, G. E.	
—rebuttal, direct	942
Monagle, M. E.	
—rebuttal, direct	897
—recalled, direct	936
Paulson, Eric	
—rebuttal, direct	848
cross	853
Pearsall, R. H.	
—direct	297
—cross	300
—redirect	301
—recross	302
—recalled, rebuttal, direct.....	937

Index	Page
Witnesses for plaintiff (cont'd):	
Robinson, N. A.	
—rebuttal, direct	900
recalled, direct	948
cross	962
Sharples, Ada W.	
—rebuttal, direct	894
cross	896
redirect	897
Wilcox, Herbert M.	
—direct	290
—cross	291
—redirect	296
—recalled, rebuttal, direct.....	931
Bond on Appeal.....	164
Certificate of Clerk of District Court.....	1042
Citation on Appeal.....	166
Complaint, Amended	1
Demurrer to Amended Answer.....	77
Errors, Assignment of.....	123
Exceptions, Bill of.....	168
Judgment	123
Motion for, notwithstanding verdict.....	121
Motion for Judgment Notwithstanding the Verdict	121
Motion for New Trial.....	115
Order Allowing Appeal.....	163
Order Approving Bond on Appeal.....	166

Index	Page
Order, Dated February 23, 1935, Overruling Motion for New Trial and Motion for Judgment Notwithstanding Verdict.....	122
Order, Dated November 9, 1935, Overruling Plaintiff's Objections Re: Inclusion Certain Evidence in Bill of Exceptions.....	1036
Order Enlarging Return Day, Dated July 11, 1935	1037
Order Enlarging Return Day, Dated August 10, 1935	1038
Order Enlarging Return Day, Dated October 14, 1935	1038
Order (Overruling Demurrer to Amended Answer, as Amended) Dated January 19, 1935	78
Petition for Appeal.....	162
Plaintiff's Objections Re: Bill of Exceptions and Inclusion Certain Evidence Therein.....	1033
Praecipe	1040
Reply to Amended Answer, as Amended.....	79
Verdict	112

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In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 3167A

ELECTRICAL RESEARCH PRODUCTS, INC.,
a corporation,

Plaintiff,

vs.

W. D. GROSS,

Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff, and, for cause of action,
complains and alleges:

FIRST CAUSE OF ACTION:

I.

That plaintiff is now and at all the times herein-after mentioned was a corporation duly organized and existing under the laws of the State of Delaware; that plaintiff is duly authorized to engage in business in the Territory of Alaska, and that it has paid its corporate annual license tax last due to said Territory.

II.

That, for an in consideration of their mutual covenants, stipulations and representations as therein set forth, plaintiff and defendant heretofore and on or about March 28, 1929, entered into a certain written agreement, and thereafter and on or about September 4, 1929, mutually modified said agreement, in which agreement, as so modified, they mutually agreed, among other things, that plaintiff did thereby grant defendant a non-exclusive, non-assignable license to use in his theatre in Juneau, Alaska, which is commonly known as the "Coliseum Theatre", certain equipment more particularly designated as "Type 2-S equipment designed for use with two simplex projectors for film and disc reproduction" for the electrical reproduction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, for a term of ten (10) [1*] years in said theatre, subject to the terms of said

*Page numbering appearing at the foot of page of original certified Transcript of Record.

agreement, and that during the life of said license, plaintiff should make inspections and minor adjustments in said equipment after it was installed, and that defendant should pay plaintiff for its services in making said inspections and minor adjustments in said equipment the sum of \$29.75 per week, payable, after the first two weeks of said term, in advance on Saturday of each week, and that the defendant should pay the plaintiff the latter's installation charges as from time to time established for any additional equipment or spare or renewal parts, furnished or supplied by plaintiff, upon delivery thereof, and to pay plaintiff the transportation charges thereon, and that the title to and ownership of all equipment at any time furnished by plaintiff under said agreement and also of all tools of all kinds, drawings, prints and written descriptions and instructions should remain vested in plaintiff, and that said agreement and the license thereby granted should at plaintiff's option, terminate and come to an end upon the happening of the following, among other events, which in said agreement were designated to be events of default, to-wit: Upon the failure or refusal of the defendant for any reason to pay any of the items or sums in said agreement by him agreed to be paid, within five (5) days after such item or sum shall become due, and that time should be of the essence of said provision in said agreement relating to the making of the failure or refusal of the defendant for any reason to pay any of the items or sums in said agreement by him agreed to be paid an event of

default under the terms of said agreement, and that, in the event of a default in any of the events so designated to be events of default, at any time during the term of said license, said license and all obligations imposed upon plaintiff by virtue of said agreement should, at plaintiff's option and whether or not it terminated said agreement or removed said equipment as in said agreement provided, be suspended during the continuance of such default, [2] and further that "upon termination or expiration of this license by lapse of time or otherwise, the Exhibitor (by which name the defendant was designated in said agreement) will surrender up and deliver possession of the Equipment to Products (by which name plaintiff was designated in said agreement) in good order and condition, reasonable wear and tear and obsolescence due to proper use thereof in the manner and place and for the purpose set forth in this agreement only excepted, and Products (by which name plaintiff was designated in said agreement) may repossess the equipment and may, for the purpose of reducing the same to possession, enter the Theatre or any other premises where said Equipment may be and without any legal proceedings whatever possess and remove said Equipment, and the Exhibitor (by which name the defendant was designated in said agreement) agrees to cooperate in such removal. If this license shall be terminated by default, or if the Exhibitor (by which name the defendant was designated in said agreement) permits any of the events of default, hereinbefore enumerated, to occur whether or not

Products (by which name plaintiff was designated in said agreement) shall exercise the option to terminate this agreement, Products (by which name plaintiff was designated in said agreement) shall thereupon have the right without notice to take immediate possession of said Equipment, or any part thereof, and for that purpose may pursue the same wherever it or any part thereof may be found and may enter, with the aid and assistance of any person or persons, the Theatre or other premises of the Exhibitor (by which name the defendant was designated in said agreement) and such place or places whatsoever, whether belonging to the Exhibitor (by which name the defendant was designated in said agreement) or not, in which the Equipment or any part thereof may be placed, and may take and seize the same to its own proper use forever, free from any right of the Exhibitor (by which name the defendant was designated in said agreement) under this agreement. Products (by which name plaintiff was designated in said agreement) shall also have the right in like manner to enter the said premises and remove the Equipment in the event [3] of the said premises being destroyed or damaged by fire, or otherwise, to an extent which, in the opinion of Products (by which name plaintiff was designated in said agreement) endangers the Equipment. The Exhibitor (by which name the defendant was designated in said agreement) expressly covenants that in any such event no claim will be made for damage on account of such removal or otherwise, and the

Exhibitor (by which name the defendant was designated in said agreement) further agrees that it will hold and save harmless Products (by which name plaintiff was designated in said agreement) from and against any and all claims for damages by any parties whatsoever on account of such removal."

III.

That said equipment thereafter and more than two weeks prior to May 24, 1930, was installed, and at all times since has been and does now continue to be installed, in said theatre and that thereafter plaintiff fully and faithfully performed the terms of said agreement, as so modified, and said inspections and minor adjustments in said equipment in said theatre for the period from May 24, 1930, to and including March 7, 1931, but that defendant has failed and refused to pay and has defaulted and now continues in default in the payment of said weekly sum of \$29.75 for each and all of the weeks embraced within said period and that the sum of \$1,219.75, i.e., \$29.75 for each of the forty-one (41) weeks of said period, is wholly unpaid and is now due and owing by defendant to plaintiff, and became due and owing at the following times, to-wit: The sum of \$29.75 upon May 31, 1930, and a like sum chronologically at the expiration of each and every successive seven days thereafter up to and including March 7, 1931, and that more than five (5) days have elapsed since each of the aforesaid weekly sums of \$29.75 became due and payable under said agreement as so modified; that plaintiff furnished and

supplied defendant from time to time between May 20, 1930, and February 17, 1931, with additional equipment an itemized statement whereof, together with plaintiff's list installation charges therefor, established for and during said time, is hereunto [4] attached, marked Exhibit 1, and specifically made a part hereof, and that the title to and ownership of all said additional equipment now remains vested in plaintiff, and that plaintiff's list installation charges therefor, including transportation charges amount to \$32.52, no part of which has been paid except \$3.43, leaving a balance of \$29.09, all of which became due and owing at the respective dates, as shown upon said Exhibit 1, upon which said additional equipment was furnished and supplied, and that more than five days have elapsed since each of said sums became due and payable under said agreement as so modified.

IV.

That the actual value of said equipment is \$6,600.00.

V.

That the plaintiff is the owner of said equipment and is now lawfully entitled to the possession thereof by reason of its ownership thereof and by virtue of the provisions of said agreement as hereinabove stated, but that said property is wrongfully detained by the defendant from the plaintiff; that plaintiff is uninformd as to the cause of defendant's detention of said property other than, according to its best knowledge, information and belief, defendant refuses to perform and carry out the terms of said agree-

ment as so modified; that said property has not been taken for a tax, assessment or find, pursuant to a statute, or seized under an execution or attachment against the property of this plaintiff.

VI.

That the rental value of said equipment is \$1,-050.00 per year, or for any part of a year, and that plaintiff has been damaged by defendant's detention of said property in the sum of \$1,050.00 for the year commencing March 7, 1931, or such portion thereof as defendant detains said property, and plaintiff will continue to be damaged at said rate during each successive year or fraction of a year that defendant continues to detain said property.

VII.

That plaintiff has been compelled to employ an attorney to institute and prosecute this suit; and that \$600.00 is a [5] reasonable attorney's fee for it to pay to its said attorney.

VIII.

That plaintiff heretofore, to wit, on March 27, 1931, made demand upon defendant that he return the aforesaid property, but that defendant has refused to return and has not returned said property or any part thereof.

SECOND CAUSE OF ACTION

I.

That plaintiff is now and at all the times herein-after mentioned was a corporation duly organized

and existing under the laws of the State of Delaware; that plaintiff is duly authorized to engage in business in the Territory of Alaska, and that it has paid its corporate annual license tax last due to said Territory.

II.

That, for and in consideration of their mutual covenants, stipulations and representation as therein set forth, plaintiff and defendant heretofore and on or about March 28, 1929, entered into a certain written agreement, and thereafter and on or about September 4, 1929, mutually modified said agreement, in which agreement, as so modified, they mutually agreed, among other things, that plaintiff did thereby grant defendant a non-exclusive, non-assignable license to use in his theatre in Ketchikan, Alaska, which is commonly known as the "Coliseum Theatre", certain equipment more particularly designated as "Type 2-S equipment designed for use with two simplex projectors for film and disc reproduction" for the electrical reproduction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, for a term or ten (10) years in said theatre, subject to the terms of said agreement, and that, during the life of said license, plaintiff should make inspections and minor adjustments in said equipment after it was installed, and that defendant should pay plaintiff for its services in making said inspections and minor adjustments in said equipment the sum of \$29.75 per week, payable, after the first two weeks of said term, in

advance on Saturday of each week, and that the defendant [6] should pay the plaintiff the latter's installation charges as from time to time established for any additional equipment or spare or renewal parts, furnished or supplied by plaintiff, upon delivery thereof, and to pay plaintiff the transportation charges thereon, and that the title to and ownership of all equipment at any time furnished by plaintiff under said agreement and also of all tools of all kinds, drawings, prints and written descriptions and instructions should remain vested in plaintiff, and that said agreement and the license thereby granted should at plaintiff's option, terminate and come to an end upon the happening of the following, among other events, which in said agreement were designated to be events of default, to-wit: Upon the failure or refusal of the defendant for any reason to pay any of the items or sums in said agreement by him agreed to be paid, within five (5) days after such item or sum shall become due, and that time should be of the essence of said provision in said agreement relating to the making of the failure or refusal of the defendant for any reason to pay any of the items or sums in said agreement by him agreed to be paid an event of default under the terms of said agreement, and that, in the event of a default in any of the events so designated to be events of default, at any time during the term of said license, said license and all obligations imposed upon plaintiff by virtue of said agreement should, at plaintiff's option and whether or not it terminated said agreement or removed said equip-

ment as in said agreement provided, be suspended during the continuance of such default, and further that "upon termination or expiration of this license by lapse of time or otherwise, the Exhibitor (by which name the defendant was designated in said agreement) will surrender up and deliver possession of the Equipment to Products (by which name plaintiff was designated in said agreement), in good order and condition, reasonable wear and tear and obsolescence due to proper use thereof in the manner and place and for the purpose set forth in this agreement only excepted, and Products (by which name plaintiff was designated in said agreement) may repossess the equipment and may, for the purpose of reducing the same to [7] possession, enter the Theatre or any other premises where said Equipment may be and without any legal proceedings whatever possess and remove said Equipment, and the Exhibitor (by which name the defendant was designated in said agreement) agrees to cooperate in such removal. If this license shall be terminated by default, or if the Exhibitor (by which name the defendant was designated in said agreement) permits any of the events of default, hereinbefore enumerated, to occur, whether or not Products (by which name plaintiff was designated in said agreement) shall exercise the option to terminate this agreement, Products (by which name plaintiff was designated in said agreement) shall thereupon have the right without notice to take immediate possession of said Equipment, or any part thereof, and for that purpose may pursue

the same wherever it or any part thereof may be found and may enter, with the aid and assistance of any person or persons, the Theatre or other premises of the Exhibitor (by which name the defendant was designated in said agreement) and such place or places whatsoever, whether belonging to the Exhibitor (by which name the defendant was designated in said agreement) or not, in which the Equipment or any part thereof may be placed, and may take and seize the same to its own proper use forever; free from any right of the Exhibitor (by which name the defendant was designated in said agreement) under this agreement. Products (by which name plaintiff was designated in said agreement) shall also have the right in like manner to enter the said premises and remove the Equipment in the event of the said premises being destroyed or damaged by fire, or otherwise, to an extent which, in the opinion of Products (by which name plaintiff was designated in said agreement) endangers the Equipment. The Exhibitor (by which name the defendant was designated in said agreement) expressly covenants that in any such event no claim will be made for damage on account of such removal or otherwise, and the Exhibitor (by which name the defendant was designated in said agreement) further agrees that it will hold and save harmless Products (by which name plaintiff was designated in said agreement) from and against any and all claims for damages by any parties whatsoever on account of such removal." [8]

III.

That said equipment thereafter and more than two weeks prior to May 24, 1930, was installed, and at all times since has been and does now continue to be installed, in said theatre and that thereafter plaintiff fully and faithfully performed the terms of said agreement, as so modified, and said inspections and minor adjustments in said equipment in said theatre for the period from May 24, 1930, to and including March 7, 1931, but that defendant has failed and refused to pay and has defaulted and now continues in default in the payment of said weekly sum of \$29.75 for each and all of the weeks embraced within said period and that the sum of \$1,-219.75, i.e., \$29.75 for each of the forty-one (41) weeks of said period, is wholly unpaid and is now due and owing by defendant to plaintiff, and became due and owing at the following times, to-wit: The sum of \$29.75 upon May 31, 1930, and a like sum chronologically at the expiration of each and every successive seven days thereafter up to and including March 7, 1931, and that more than five (5) days have elapsed since each of the aforesaid weekly sums of \$29.75 became due and payable under said agreement as so modified; that plaintiff furnished and supplied defendant from time to time between April 7, 1930, and February 18, 1931, with additional equipment an itemized statement whereof, together with plaintiff's list installation charges therefor, established for and during said time, is hereunto attached, marked Exhibit 2, and specifically made a part hereof, and that the title to and ownership of

all said additional equipment now remains vested in plaintiff, and that plaintiff's list installation charges therefor, including transportation charges, amount to \$68.61, no part of which has been paid except \$6.69, leaving a balance of \$61.92, all of which became due and owing at the respective dates, as shown upon said Exhibit 2, upon which said additional equipment was furnished and supplied, and that more than five days have elapsed since each of said sums became due and payable under said agreement as so modified. [9]

IV.

That the actual value of said equipment is \$6,600.00.

V.

That the plaintiff is the owner of said equipment and is now lawfully entitled to the possession thereof by reason of its ownership thereof and by virtue of the provisions of said agreement as hereinabove stated, but that said property is wrongfully detained by the defendant from the plaintiff; that plaintiff is uniformed as to the cause of defendant's detention of said property other than, according to its best knowledge, information and belief, defendant refuses to perform and carry out the terms of said agreement as so modified; that said property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of this plaintiff.

VI.

That the rental value of said equipment is \$1,050.00 per year, or for any part of a year, and that

plaintiff has been damaged by defendant's detention of said property in the sum of \$1,050.00 for the year commencing March 7, 1931, or such portion thereof as defendant detains said property, and plaintiff will continue to be damaged at said rate during each successive year or fraction of a year that defendant continues to detain said property.

VII.

That plaintiff has been compelled to employ an attorney to institute and prosecute this suit; and that \$600.00 is a reasonable attorney's fee for it to pay to its said attorney.

VIII.

That plaintiff heretofore, to-wit, on March 27, 1931, made demand upon defendant that he return the aforesaid property, but that defendant has refused to and has not returned said property or any part thereof.

WHEREFORE, Plaintiff prays judgment: [10]

1. For the delivery to it of that certain personal property now situated in the Coliseum Theatre at Juneau, Alaska, and more particularly described as follows, to-wit:

“That certain equipment more particularly designated as “Type 2-S equipment designed for use with two simplex projectors for film and disc reproduction” for the electrical reproduction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any per-

formance given in conjunction therewith, now situated in the Coliseum Theatre in Juneau, Alaska;”

or, if return thereof cannot be had, for the value of said personal property, to-wit, \$6,600.00, and for \$1050.00 damages and a similar sum as damages for each successive year or fraction of a year that defendant continues to detain said property.

2. For the delivery to it of that certain personal property now situated in the Coliseum Theatre at Ketchikan, Alaska, and more particularly described as follows, to-wit:

“That certain equipment more particularly designated as ‘Type 2-S equipment designed for use with two simplex projectors for film and disc reproduction’ for the electrical reproduction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, now situated in the Coliseum Theatre in Ketchikan, Alaska;”

or, if return thereof cannot be had, for the value of said personal property, to-wit, \$6,600.00, and for \$1050.00 damages and a similar sum as damages for each successive year or fraction of a year that defendant continues to detain said property.

3. For plaintiff’s costs and disbursements herein, including \$600.00 as an attorney’s fee on its First Cause of Action herein, and \$600.00 as an attorney’s fee on its Second Cause of Action herein, and for

such other and further relief as may be meet and just.

R. E. ROBERTSON,
Attorney for Plaintiff. [11]

United States of America,
Territory of Alaska—ss.

R. E. ROBERTSON, being first duly sworn on oath, deposes and says: That he is a citizen of the United States, over the age of 21 years, a resident of the Territory of Alaska, and attorney for the within named corporate plaintiff; that he has read the foregoing amended complaint, knows the contents thereof and that the same is true as he verily believes; that he makes this verification on behalf of plaintiff for the reason that there is not now in Juneau, Alaska, the place at which this verification is made, any officer thereof upon whom service of a summons might be made other than this affiant, who is the statutory agent for service of process upon said corporate plaintiff in the Territory of Alaska.

R. E. ROBERTSON.

Subscribed and sworn to before me this 20 day of April, 1931.

[Seal]

M. E. MONAGLE,
Notary Public for Alaska. My commission expires
March 1st, 1934. [12]

EXHIBIT I.
COLISEUM THEATRE
Juneau, Alaska
ADDITIONAL EQUIPMENT SUPPLIED AND
FURNISHED

<i>Date</i>	<i>Item</i>	<i>Amount</i>	<i>Total</i>
5/20/1930	2 Grid Leaks	.73	
	1 Coupling Assembly	1.00	
	Postage	.30	\$ 2.03
6/23/1930	10 Fuses		
	2 Battery Straps		
	8 Nuts and Bolts		4.69
6/26/1930	6 KS-6243 Lamps	6.00	
	1 Felt Washer	.10	
	Postage	.33	6.43
9/23/1930	2 Cords	.40	
	Washers & Coupling	1.20	
	10 Fuses	.70	
	Postage	.42	2.72
11/11/1930	6 KS 6243 Lamps	6.00	
	2-239 A Vacuum Tubes	8.40	
	Postage	.50	14.90
1/15/1931	6-703 Batteries	1.17	
	Postage	.37	1.54
2/17/1931	2-S Shaped Springs		.21
			\$32.52
	Less cash received		3.43
			\$29.09

EXHIBIT II.
COLISEUM THEATRE
Ketchikan, Alaska

ADDITIONAL EQUIPMENT SUPPLIED AND
FURNISHED

<i>Date</i>	<i>Item</i>	<i>Amount</i>	<i>Total</i>
4/ 7/1933	6-KS 6243 Lamps	\$ 7.50	
	3-Guilder Rollers & Pad Assembly	4.35	
	Postage	.23	\$12.08
5/21/1930	6-KS-6243 Lamps	7.50	
	Postage	.33	7.83
6/16/1930	20-Fuses	3.13	
	6-KS-6243 Lamps	6.00	9.13
6/26/1930	2-Gears for 712 A Drives	5.00	
	Postage	.05	5.05
6/24/1930	2-Gears for 712-A Drives	5.00	
	Postage	.18	5.18
8/ 5/1930	2-KS 6684 Rheostats	8.70	
	Postage	.45	9.15
7/16/1930	3-239 A Vacuum Tubes at 4.20	12.60	
	20 Plug Fuses at .04	.80	13.40
11/ 1/1930	6-KS 6243 Lamps	6.00	
	2-Rubber Connectors	.14	6.14
2/18/1931	1 Lb. Grease	.30	
	8 Oz. Graphitoleo	.35	.65
			\$68.61
	Less cash received		6.69
			\$61.92

[Endorsed]: Filed Apr. 27, 1931. [14]

[Title of Court and Cause.]

AMENDED ANSWER.

Comes now the defendant and for answer to the amended complaint of the plaintiff herein admits, denies and alleges as follows:

ANSWER TO FIRST CAUSE OF ACTION

Answering the allegations of the first cause of action set forth in the amended complaint, the defendant admits, denies and alleges as follows:

I.

The defendant admits the allegations contained in paragraph I of said first cause of action.

II.

Referring to the allegations of paragraph II of the first cause of action set up in the plaintiff's amended complaint, the defendant admits that on or about the 28th day of March, 1929, the plaintiff and defendant entered into a written contract. But the defendant denies that thereafter on or about September 4, 1929, or at any other time or times or at all, said agreement was modified in writing and otherwise or at all. And the defendant denies that any modified agreement exists between him and the plaintiff. The defendant admits that under the terms of the original contract between him and the plaintiff, he was given a license to use certain equipment designated as TYPE 2-S equipment, for the terms of ten years, in the Coliseum Theatre at

Juneau. But the defendant denies that this license was given under the terms of any modified agreement and he denies that it was held subject to the terms of a modified agreement or in any other manner except under the terms of the original contract executed by the parties on or about the 28th day of March, 1929, a copy of which is attached to this answer, [15] marked EXHIBIT "A". And the defendant denies that in accordance with the terms of any modified agreement or any other agreement at all, he agreed to pay plaintiff for services in making minor adjustments and inspections to said equipment, the sum of Twenty-nine Dollars seventy-five cents (\$29.75) per week, or any other sum whatsoever, payable after the first two weeks of the term mentioned or at any other time or in any other manner. The defendant denies that he agreed to pay said sum of \$29.75 per week or any other sum or sums in advance on Saturday of each week or at any other time or in any other manner. The defendant denies that under the agreement mentioned or under any other agreement, he agreed to pay the plaintiff the latter's installation charges as from time to time established under the terms of any amended agreement. And the defendant denies that he agreed to pay the plaintiff any transportation charges under the terms of such an amended agreement. And the defendant denies that the title to or ownership of said equipment furnished by plaintiff under any amended agreement or any other agreement, and that title to tools, drawings, prints

or written descriptions or instructions were agreed, under the terms of any amended agreement or any agreement whatsoever, to remain vested in plaintiff. In this connection the defendant denies that there was or is any modified agreement between him and the plaintiff, or any other agreement or agreements save and except the original contract made between the parties on or about the 28th day of March, 1929, a copy of which is attached hereto, marked EXHIBIT "A", which is hereby referred to and made a part hereof. The defendant denies that the said agreement or license should at the plaintiff's option, terminate and come to an end upon the refusal of the defendant, for any reason, to pay any of the items or sums set forth in this cause of action as constituting default of the defendant, within five days after such items or sums shall become due, and at any other time. The defendant denies that time was or is to be considered of the essence of said agreement relating to the making or refusal to make the payment or payments of the money referred to in this cause of action. And the defendant denies each and every other allegation in said paragraph contained. [16]

III.

Referring to the allegations of paragraph III of said first cause of action, the defendant admits that the plaintiff installed equipment in his theatre at Juneau, more than two weeks prior to May 24, 1930, but he denies that said equipment has at all

times since continued to be installed in said theatre. And the defendant further denies that plaintiff has fully or faithfully, *at* at all, performed or furnished inspections or minor adjustments to said equipment in said theatre, or elsewhere, for a period from May 4, 1930, to and including March 7, 1931, or for or during any other time or times or at all. In this connection the defendant further denies that the plaintiff has furnished him with any inspection or service whatsoever during the period mentioned or at all. And the defendant denies that there is now due the plaintiff from him, the sum of One Thousand Two Hundred Nineteen Dollars seventy-five cents (\$1,219.75), or any other sum or sums whatsoever; denies that said sum mentioned in said paragraph or any other sum or sums became due and owing on May 31, 1930, or at any other time or times; denies that a like sum or any other sum chronologically or otherwise became due the plaintiff from the defendant at the expiration or at the end of each and every successive seven days, from May 31, 1930, up to or including March 7, 1931, or at any other time or times, or at all. In this connection the defendant denies that he is indebted to the plaintiff in any sum or sums whatsoever, either on account of the matters or things referred to in paragraph III or at all; denies that he has defaulted; and further denies that he now continues in default for want of payments in said paragraph mentioned; denies that more than five days have elapsed since any of the therein mentioned weekly

sum of \$29.75 became due and payable under said agreement; denies that any sum became due or is due; denies that said agreement was modified; denies that the sum of \$29.09, or any other sum, became due and owing at the respective dates shown on EXHIBIT "A", or at any other time; [17] denies that more than five days have elapsed since any of the sums became due and payable under said agreement; denies that said agreement was modified.

IV.

For answer to paragraph IV of the first cause of action set forth in the amended complaint herein, the defendant denies that the actual value of said equipment is any sum less than \$10,077.00.

V.

For answer to paragraph V of the first cause of action set up in the amended complaint herein, the defendant admits that the plaintiff is the owner of said equipment, but denies that the plaintiff is lawfully entitled to the possession thereof by reason of the ownership thereof, or by reason of the provisions of said agreement; denies that said property is unlawfully detained by the defendant; denies that the defendant refuses to perform and carry out the terms of his agreement, but denies that the agreement, EXHIBIT "A" attached hereto, has been modified. Defendant admits the said property has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution and attachment against the property.

VI.

For answer to paragraph VI of the first cause of action set up in the amended complaint, the defendant denies that the rental value of equipment is any sum less than \$1,250.00 per year; denies that the rental value for a part of a year is equal to a whole year, or any sum greater than the percentage the part of the year bears to the whole year. The defendant denies that the plaintiff has been damaged, by the defendant's detention of said property, in the sum of \$1,050.00, or any other sum; and denies that the plaintiff will continue to be damaged at said rate during each successive year or fraction thereof at said rate, or any other rate for each said year and fraction of the year, or any other time.

VII.

For answer to paragraph VII of the first cause of action set up in the amended complaint, the defendant denies the [18] allegations therein contained.

VIII.

For answer to paragraph VIII of the first cause of action set up in the amended complaint herein, the defendant admits that the plaintiff made a demand upon the defendant for the return of the property therein mentioned; admits that he has refused to return said property; and admits that he had not returned said property or any part thereof at the time this cause of action was begun, nor at any other time, except as hereinafter stated.

FIRST AFFIRMATIVE DEFENSE.

The defendant further answering the first cause of action set up in the amended complaint of the plaintiff herein and by way of affirmative defense, alleges:

I.

That under date of the 28th day of March, 1929, the plaintiff and the defendant entered into a contract, a copy of which is attached hereto marked EXHIBIT "A" which is hereby referred to and made a part hereof.

II.

That the agreement referred to in paragraph I hereof is still in full force and effect and has never been modified, rescinded, or revoked.

III.

Referring to the allegations of paragraph II of the first cause of action embodied in plaintiff's amended complaint herein, where it is alleged that after the agreement of March 28, 1929, had been executed, and on or about September 4, 1929, the agreement of March 28, 1929, was mutually modified. And referring also to the paper writing filed by the plaintiff and marked EXHIBIT "2", which was served upon the defendant by the plaintiff in response to a request for a copy of the agreement, alleged to have been executed on or about September 4, 1929, by which the previous agreement of March 28, 1929 is alleged to have been mutually modified, the defendant avers as follows: [19]

(a) That the paper writing so served upon the defendant as aforesaid, by the plaintiff, is in words and figures as follows, to-wit:

EXHIBIT "2"

ELECTRICAL RESEARCH PRODUCTS Inc.

Acoustic Department

250 West 57th Street,

New York City, N. Y.

Subsidiary of

Western Electric Company

Incorporated

September 4, 1929.

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of Western-Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provisions left blank relating to weekly payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge), and inserting in lieu thereof the following:

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service and inspection payment shall be \$29.75 per week, which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means of transportation incurred in connection with emergency service visits.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Yours very truly,

R. A. ANDERSON.

Comptroller.

Accepted:

W. D. GROSS.

Exhibitor's Signature Witnessed by:

J. A. GAGE. [20]

(b) That said writing is a mere letter addressed to the defendant by the person whose name is signed to it, and does not constitute a contract between the parties in accordance with the provisions embodied in the contract of March 28, 1929, above referred to, nor was it signed or executed by the parties at all.

(c) That the paper writing above set forth in full, does not constitute a contract between the parties, and is void and unenforceable for the reason that the same is without consideration.

(d) That the signature of the defendant to said paper writing, as it appears above, was obtained by duress, which consisted in this: At the time said signature was obtained, the defendant had not yet fully paid the plaintiff the full amount of Ten Thousand Five Hundred Dollars (\$10,500.00) to be paid it for installing and supplying the defendant with the equipment, and more fully described in the contract of March 28, 1929, but had fully complied with all the terms of said contract on his part and had already paid thereon all that was then due including the sum of \$7,868.75 principal, and the interest thereon. That the plaintiff then and there threatened the defendant that unless he signed the paper writing above last set forth in full, in the manner thereon indicated, the plaintiff would immediately disconnect and remove the equipment supplied by it under the agreement of March 28, 1929, and deprive the defendant of the use thereof, causing him to lose all the monies theretofore paid, and

leave him without equipment to operate his theatre. And the agent and employee of the plaintiff, by whom this threat was communicated to the defendant to-wit: J. A. Gage, told the defendant then and there, that the plaintiff had power to carry out said threat and could and would do so, under his contract of March 28, 1929. That the defendant was not sufficiently learned in the law to know his rights under the contract of March 29, 1929, and believed the statements so made to him by the representative of plaintiff, in relation to such rights. And the defendant further believed that the plaintiff could and would disconnect and remove from his theatre, the equipment placed there under the contract of March 28, 1929, unless he complied with the request that he sign the paper writing, above referred to, in the manner indicated [21] thereon. The defendant had a large sum, to-wit: many thousands, invested in a theatre building, and in the good-will of the business, which said good-will would be entirely destroyed if the equipment supplied him under the contract of March 28, 1929, were disconnected or removed. Especially so, since at that time, no other equipment to take its place, could be procured by the defendant, all of which facts were well known to the plaintiff at the time, as well as to the defendant. That the defendant firmly believed that there was no way for him to save the large amount already paid, or to keep his business from being destroyed, except by complying with the demand of the plaintiff and its agent, that he sign the paper writing

above referred to and so believing, and because of said threats, and not otherwise, the defendant placed his signature upon said writing at the point indicated upon said writing, for the sole purpose of protecting himself and his property against the unlawful threats made by the plaintiff as aforesaid.

IV.

That the defendant has been compelled to employ attorneys to defend this case, and avers that One Thousand Dollars (\$1,000.00) is a reasonable attorney's fee for the plaintiff to pay to his said attorneys.

SECOND AFFIRMATIVE DEFENSE.

That the defendant further answering said first cause of action set up in the plaintiff's amended complaint, and by way of affirmative defense, alleges:

I.

That the plaintiff wholly failed to comply with the provisions of the contract of March 28, 1929, in that it wholly failed to make the regular periodical inspections and render minor adjustment service, as it was required to do by the terms of said contract. That the plaintiff did not make inspection except that on rare occasions, which occurred at irregular intervals, when the plaintiff caused some inexperienced and unqualified youths to call at the defendant's theatre. These [22] representatives of the plaintiff, however, did not inspect the equipment, nor did they make any adjustments except that in

one or two instances, they would do something to the machinery, the defendant does not know exactly what, which rendered the equipment useless, and put it out of commission, so that the defendant's engineers were compelled to put it back into a state of repair. In this connection, the defendant further avers: That the plaintiff never rendered him any regular periodical inspection, nor minor adjustment service. And the defendant further avers: That on several occasions since the installation of the equipment furnished by the plaintiff to the defendant, the equipment became useless as the result of breakdowns occasioned by defects in the machines and otherwise, and that on each and all of such occasions, the defendant notified the plaintiff by wire, asking that a service man be forthwith dispatched to Juneau to repair the equipment; and that on each and every such occasion, the plaintiff either ignored the request of the defendant in this regard, or sent a service man weeks after the breakdown had taken place, so that the defendant was obliged to, and did from the first, hire and keep his own engineers at Juneau, who in every case, made the necessary repairs weeks before the arrival of any service man in the employ of the plaintiff. And in this connection, the defendant further avers: That the plaintiff never sent a service man to Alaska in response to a request for service, by the defendant, or otherwise, in connection with the servicing of defendant's theatre, but made a pretense to comply with such requests by having service men pass through, enroute to the Westward

and Interior of Alaska, to stop off and call at the defendant's theatre while the steamer on which they were traveling, was in port; and that in all cases, said service men arrived weeks after the repairs which they were supposed to make had already been made by the defendant's engineers. In this connection, the defendant avers: That the plaintiff never rendered any service to the defendant in connection with the repair of maintenance of the equipment installed, nor did the plaintiff do anything that had the effect of keeping said equipment in running order, or that had the tendency to accomplish this [23] purpose. And in this connection it is alleged that the word "service", when used in connection with equipment by those engaged in the motion picture industry means the service necessary to keep the equipment in repair at all times.

III.

That the defendant has been compelled to employ attorneys to defend this case and avers: That One Thousand Dollars (\$1,000.00) is a reasonable attorney's fee for the plaintiff to pay his said attorneys.

THIRD AFFIRMATIVE DEFENSE.

The Defendant further answering said first cause of action, set up in the plaintiff's amended complaint, by way of affirmative defense alleges:

I.

That all of the machinery, appliances, equipment and all of the repair parts referred to in the

amended complaint and contract therein referred to, a copy of which contract is attached hereto marked EXHIBIT "A", which is hereby referred to and made a part hereof, were shipped from some place within the United States proper to the Territory of Alaska, and were articles of Interstate Commerce, and the plaintiff herein was engaged in Interstate Commerce in making and carrying out said contract.

II.

That the contract referred to in the complaint, a copy of which is attached hereto and marked EXHIBIT "A", is a contract that by its provisions substantially lessens competition and tends to create a monopoly in the Sound Moving Picture business, and is illegal and void under Section 3 of the Clayton Act, (15 U. S. C. A., Sec. 14) and Sec. 1, 2, and 3 of the Sherman Anti-Trust Act, (15 U. S. C. A., Sec. 1, 2, 3.) which contract is void as a whole and especially in the following particulars:

Section 2. * * * The Exhibitor shall not without the written consent of Products, move, alter, change or modify the Equipment, nor add anything thereto, nor take anything therefrom; * * * nor operate, use, or employ the equipment in any manner in conjunction with any sound record not made under license from Products * * * it is agreed that all renewal parts and assembled parts for the Equipments shall be obtained from Products. * * *

Section 4. * * * Products also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed. Products may from time to time install such spare and renewal parts as may in its opinion, be necessary to the satisfactory operation and maintenance of the Equipment.
* * * [24]

Section 8. * * * The Exhibitor agrees to pay to Products its list installation charges as from time to time established for any additional Equipment or spare or renewal parts, furnished or supplied by Products, upon delivery thereof and to pay the transportation charges thereon. The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connection with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for. * * *

Section 10. * * * Title to and ownership of all Equipment at any time furnished hereunder and also all tools of all kinds, drawings, prints, and written instructions, remains vested in Products. * * *

Section 12. * * * The Exhibitor will permit Products, through its designated agents, engineers, and mechanics, to have access to the Theatre at all reasonable hours, for the purpose

of installing and from time to time for the purpose of examining and inspecting the Equipment, and will grant to Products, full opportunity to make such adjustments therein and repairs thereto as, in the opinion of Products are necessary or desirable.

Which agreement also contains the following provisions:

Section 14. * * * This agreement and the license hereby granted, shall, at the option of Products, terminate and come to an end upon the happening of any of the following events, hereby designated to be events of default, to-wit:

(B) Upon the failure or refusal of the Exhibitor for any reason to pay any of the items or sums agreed to be paid by it, including the payment of any of the notes provided for in Section 5 hereof, within five days after such item or sum is or may become due, and as to this provision time shall be of the essence.

(D) Upon a breach by the Exhibitor of any of the covenants herein contained relative to the use or maintenance of the Equipment, continued for more than fourteen (14) days after notice thereof by registered mail from Products.

(F) Upon the failure of the Exhibitor to accept delivery of the equipment from the transportation company or common carrier, or to

facilitate the work of Products in installing the equipment.

In the event of a default under any of the provisions of this section at any time during the term of this license, the license hereby granted and all obligations imposed upon Products by virtue of this agreement, shall, at the option of Products and whether or not it terminates this license or removes the Equipment as hereinafter provided, be suspended during the continuance of such default. * * *

Section 15. * * * If this license shall be terminated by default, or if the Exhibitor permits any of the events of default hereinbefore enumerated, to occur, whether or not Products shall exercise the option to terminate this agreement, Products shall thereupon have the right without notice to take immediate possession of said equipment, or any part thereof, and for that purpose may pursue the same wherever it or any part thereof may be found, and may enter, with the aid and assistance of any person or persons, the Theatre or other premises of the Exhibitor and such place or places whatsoever, whether belonging to the Exhibitor or not in which the Equipment or any part thereof may be placed, and may take and seize the same to its own proper use forever, free from any right of the Exhibitor under this agreement. * * * [25]

Section 22. * * * In addition to all other payments herein provided for, the Exhibitor agrees to pay promptly upon receipt of invoice therefore, Products' charges in connection with the installation of said Equipment which arise by reason of such installation being without the States of the United States. * * *

III.

That Section six (6) set forth in Exhibit "2" filed in this cause, taken in connection with the contract of which it is claimed to be a part, is void in that it tends substantially to lessen competition and tends to create a monopoly in this line of commerce under Section (3) of the Clayton Act, (15 U. S. C. A., Sec. 14) and Sections 1, 2, and 3, of the Sherman Anti-Trust Act, (15 U. S. C. A., Sections 1, 2, and 3).

Which said section six (6) is in words and figures as follows, to wit:

Section 6. * * * In addition to any other payments required by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to

time established. Under Products' present schedule, the service and inspection payment shall be \$29.75 per week which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means of transportation incurred in connection with emergency service visits. * * *

That the services contemplated and rendered under Section Six (6) aforesaid, and Section four (4) and Section eight (8) of said contract, hereinbefore set forth, were not services for the benefit of the defendant, or for the purpose of repairing and keeping the machines and equipment in condition, but were for the purpose of supplying the defendant with additional equipment and parts whether or not the same were necessary; and were made in order to prevent the defendant from purchasing and using parts and equipment made by other manufacturers, and were inserted in said contract so that Plaintiffs could, and the Plaintiffs did, under said provisions, substantially lessen competition and prevent the defendant from using other and different parts than those sold or produced by the Plaintiffs, and thus tend to create a monopoly in this line of commerce to-wit: The Sound Motion Picture Business, and the privileges alleged to have been conferred under said [26] sections were intended to be employed and were employed and were employed as means and instru-

ments designed to carry out the illegal purposes of the contract above referred to.

FIRST COUNTER CLAIM.

Comes now the defendant and files this, his counter claim against the plaintiff, and for cause of action on said counter claim the defendant alleges:

I.

That the plaintiff now is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Delaware, doing business in the Territory of Alaska, under and by virtue of the laws thereof.

II.

That the defendant is, and at all times hereafter mentioned was the owner of a motion picture theatre in the City of Juneau, which said theatre is known as the Coliseum Theatre.

III.

That for the purpose of equipping said theatre, the defendant did, on the 28th day of March, 1929, enter into a written contract with the plaintiff, a copy of which said contract is attached hereto marked EXHIBIT "A" and is hereby referred to and made a part hereof.

IV.

That under the provisions of the contract above referred to, the plaintiff did install, in the defend-

ant's Coliseum Theatre at Juneau, the equipment described in said contract as the equipment which the plaintiff agreed to install in accordance with the terms of said contract. And the defendant complied with said contract in all respects paid to the plaintiff, the full sum of Ten Thousand Five Hundred Dollars (\$10,500.00), as principal, and interest thereon in accordance with provisions of said contract, and in addition thereto, paid the sum of Two Hundred Five Dollars (\$205.00) freight on said equipment and the further sum of Twenty-one dollars (\$21.00) cartage on the same. [27]

V.

That pursuant to the installation of said equipment, the defendant used the same in connection with the operation of his theatre and did so operate his theatre, and so employ said equipment, that he built up a lucrative business and established a goodwill and reputation for his said theatre, which had a money value of Fifty Thousand Dollars (\$50,000.00).

VI.

That the plaintiff did, on the 20th day of April, 1931, commence this proceeding in this court, with the view of replevining the equipment installed under the aforesaid contract of March 28, 1929. And the plaintiff did, then and there, replevin said equipment and take the same from the possession of the defendant and deprive the defendant of the

use thereof, and transport said equipment to some point without the Territory of Alaska. Which said proceedings was instituted, maintained, and carried on for the sole purpose of coercing the defendant to pay monies not due and owing by him to the plaintiff, and were instituted, carried on, and maintained in violation of the contract of March 28, 1929.

VII.

That because of the removal of the equipment from the defendant's Coliseum Theatre on April 20, 1931, as aforesaid, the defendant was obliged to close down his theatre until new and other equipment could be installed, and the defendant on account of said removal was compelled to keep his said theatre closed from April 20, 1931, to April 21, 1931 both dates inclusive.

VIII.

That because of the acts of the plaintiff in so removing the equipment installed under the contract of March 28, 1929, compelling the theatre to be so closed temporarily, and compelling the defendant to procure other equipment, the business of the defendant at his Coliseum Theatre was greatly injured, and the profits therefrom were reduced more than Two Thousand Dollars (\$2,000.00) per month, and the good-will of the business was injured in an amount exceeding Twenty-five Thousand Dollars [28] (\$25,000.00); and the defendant

was compelled, in order to keep his theatre going at all, and prevent a total loss of his entire business and good-will, to pay out the sum of Four Thousand Four Hundred Fifty-six Dollars (\$4,456.00) in order to procure the installation of other equipment, which other equipment was procured by the defendant with as much speed as possible, and was, and is the best obtainable, although less efficient than the equipment removed by the plaintiff, and so inferior thereto as to cause a loss of profits from operations of defendant's said theatre to the extent of Two Thousand Dollars (\$2,000.00), per month as aforesaid, which loss of business due to the use of inferior equipment has continued from April 21, 1931, to May 1, 1933, twenty-one and one-third months.

IX.

That the rental value of the equipment so wrongfully moved from the defendant's Coliseum Theatre at Juneau, by the plaintiff, for the unexpired term of the lease embodied in the agreement of March 28, 1929, is Nine Thousand Six Hundred Twenty-seven Dollars and three cents (\$9,627.03), Ninety-nine Dollars fifty-nine cents (\$99.59), per month for 96 $\frac{2}{3}$ months with interest thereon from April 20, 1931, and plaintiff replevined additional parts belonging to the defendant in the value of Four Hundred Fifty Dollars (\$450.00). That by reason of the premises, the defendant has been damaged in the above amounts.

X.

That the defendant has been compelled to employ attorneys to prosecute this case, and avers: That Three Thousand Dollars (\$3,000.00) is a reasonable attorneys' fee for the plaintiff to pay his said attorneys.

SECOND COUNTER CLAIM.

Comes now the defendant and presents this, his second counter claim to the first cause of action and alleges:

I.

That the plaintiff now is, and at all times herein-after mentioned was, a corporation duly organized and existing under the [29] laws of the State of Delaware, doing business in the Territory of Alaska, under and by virtue of the laws thereof.

II.

That the defendant is, and at all times hereafter mentioned, was the owner of a motion picture theatre in the City of Juneau, which said theatre is known as the Coliseum Theatre.

III.

That for the purpose of equipping said theatre, the defendant did, on the 28th day of March, 1929, enter into a written contract with the plaintiff, a copy of which said contract is attached hereto, marked EXHIBIT "A" and is hereby referred to and made a part hereof.

IV.

That under the provisions of the contract above set forth, the plaintiff did install, in the defendant's Coliseum Theatre at Juneau, the equipment described in said contract as the equipment which the plaintiff agreed to install in accordance with the terms of said contract. And the defendant paid to the plaintiff, the full sum of Ten Thousand Five Hundred Dollars (\$10,500.00), as the principal, and interest in accordance with provisions of said contract, and in addition thereto, paid the sum of Two Hundred Five Dollars (\$205.00) freight, and Twenty-one (\$21.00) cartage on said equipment.

V.

That on or about the 30th day of December, 1929, the plaintiff threatened to remove and take from the possession of the defendant, all the equipment heretofore installed by it in the Coliseum Theatre as aforesaid, and deprive the defendant of the use thereof unless the defendant paid the plaintiff the sum of One Thousand Nineteen Dollars (\$1,019.00), which defendant had not contracted to pay, and which was not due plaintiff, for pretended services, which the plaintiff never rendered, and told the defendant, then and there, that it had the power and the authority to carry out its said threats, and would so if said amount were not immediately paid. That at the time said [30] threat was made to the defendant, he had not yet fully paid the Ten Thousand Five Hundred Dollars (\$10,500.00),

due the plaintiff under the contract of March 28, 1929, although all payments due on account thereof had been paid, and the defendant was cognizant of the fact that a removal of said equipment would ruin his business, destroy the good-will he had established, and result in financial losses. The defendant not being sufficiently learned in the law to know his rights under the contract of March 28, 1929, and believing that the plaintiff had the power to carry out its said threats, and would carry out its said threats, then and there paid the plaintiff the sum of One Thousand Nineteen Dollars (\$1,019.00), because of the threats so made by the plaintiff, and under duress as aforesaid. And thereafter the plaintiff continued to threaten the defendant that unless he paid further amounts it would disconnect the equipment, and defendant believing that the plaintiff could and would carry out the threats, paid the plaintiff the following additional amounts: February 10, 1930, \$119.00; April 2, 1930, \$238.00; November 1, 1930, \$208.25; making a total of One Thousand and Five Hundred Eighty-Four Dollars and twenty-five cents (\$1,584.25).

VI.

That by reason of the premises there is now due and owing, from the plaintiff to the defendant, the sum of One Thousand Five Hundred Eighty-four Dollars and twenty-five cents (\$1,584.25), with interest thereon at 8% per annum from the dates

the payments were made, which said sums have not been paid to the defendant, nor any part thereof.

VII.

That the defendant has been compelled to employ attorneys to prosecute this case, and avers: That Two Hundred Fifty Dollars (\$250.00), is a reasonable attorneys' fee for the plaintiff to pay his said attorneys.

ANSWER TO SECOND CAUSE OF ACTION.

Answering the allegations of the second cause of action [31] set forth in the amended complaint, the defendant admits, denies and alleges as follows:

I.

The defendant admits the allegations contained in paragraph I of said second cause of action.

II.

Referring to the allegations of paragraph II of the second cause of action set up in the plaintiff's amended complaint, the defendant admits that on or about the 28th day of March, 1929, the plaintiff and defendant entered into a written contract. But the defendant denies that thereafter on or about September 4, 1929, or at any other time or times, or at all, said agreement was modified in writing or otherwise or at all. And the defendant denies that any modified agreement exists between him and the plaintiff. The defendant admits that under the terms of the original contract between him and

the plaintiff, he was given a license to use certain equipment designated as TYPE 2-S equipment for the term of ten years, in the Coliseum Theatre at Ketchikan. But the defendant denies that this license was given under the terms of any modified agreement and he denies that it was held subject to the terms of a modified agreement or in any other manner except under the terms of the original contract executed by the parties on or about the 28th day of March, 1929, a copy of which is attached hereto, marked EXHIBIT "B". And the defendant denies that in accordance with the terms of any modified agreement or any other agreement or at all, he agreed to pay plaintiff for services in making inspections and minor adjustments to said equipment, the sum of \$29.75 per week, or any other sum whatsoever, payable after the first two weeks of the term mentioned or at any other time or in any other manner. The defendant denies that he agreed to pay said sum of \$29.75 per week or any other sum or sums in advance on Saturday of each week or at any other time, or in any other manner. The defendant denies that under the agreement mentioned, or under any other agreement, he agreed to pay the plaintiff the latter's installation [32] charges as from time to time established under the terms of any amended agreement. And the defendant denies that he agreed to pay the plaintiff any transportation charges under the terms of such amended agreement. And the defendant denies that the title to or ownership of said equipment

furnished by plaintiff under any amended agreement or any other agreement, and the title to tools, drawings, prints, or written descriptions or instructions were agreed, under the terms of any amended agreement or any agreement whatsoever, to remain vested in plaintiff. In this connection the defendant denies that there was or is any modified agreement between him and the plaintiff or any other agreement save and except the original contract made between the parties on or about the 28th day of March, 1929, a copy of which is attached hereto, marked EXHIBIT "B", which is hereby referred to and made a part hereof. The defendant denies that the said agreement or license should at plaintiff's option terminate and come to an end upon the refusal of the defendant, for any reason, to pay any of the items or sums set forth in this cause of action as constituting default of the defendant, within five days after such items or sums shall become due, and at any other time. The defendant denies that time was or is to be considered the essence of said agreement relating to the making or refusal to make the payments or payment of the money referred to in this cause of action. And the defendant denies each and every other allegation in said paragraph contained.

III.

Referring to the allegations of paragraph III of said second cause of action, the defendant admits that the plaintiff installed equipment in his theatre

at Ketchikan, more than two weeks prior to May 24, 1930, but he denies that said equipment has at all times since continued to be installed in said theatre. And the defendant further denies that plaintiff has fully or faithfully, or at all, performed or furnished inspections or minor adjustments to said equipment in said theatre, or elsewhere for the period from May 4, 1930, to and including March 7, 1931, or for or during any other period or at any [33] other time or times, or at all. In this connection the defendant further denies that the plaintiff has furnished him with any inspection or service whatsoever during the period mentioned or at all. And the defendant denies that there is now due the plaintiff from him, the sum of (\$1,219.75), or any other sum or sums whatsoever; denies that said sum mentioned in said paragraph or any other sum or sums became due and owing on May 31, 1930, or at any other time or times; denies that a like sum or any other sum chronologically or otherwise became due the plaintiff from the defendant at the expiration or at the end of each and every successive seven (7) days from May 31, 1930, up to or including March 7, 1931, or at any other time or times, or at all. In this connection the defendant denies that he is indebted to the plaintiff in any sum or sums whatsoever, either on account of the matters of things referred to in paragraph III or at all, denies that he has defaulted; and further denies that he now continues in default for want of payments in said paragraph mentioned;

denies that more than five (5) days have elapsed since any of the therein mentioned weekly sum of \$29.75 became due and payable under said agreement; denies that any sum became or is due; denies that said agreement was modified; denies that the sum of \$29.75 or any other sum, became due and owing at the respective dates shown on EXHIBIT "B", or at any other time; denies that more than five (5) days have elapsed since any of the sum became due and payable under said agreement, denies that said agreement was modified.

IV.

For answer to paragraph IV of the second cause of action set forth in the amended complaint herein, the defendant denies that the actual value of said equipment is any sum less than \$10,077.00.

V.

For answer to paragraph V of the second cause of action set up in the amended complaint herein, the defendant admits that the plaintiff is the owner of said equipment, but denies that the plaintiff is lawfully entitled to the possession thereof by reason [34] of the ownership thereof, or by reason of the provisions of said agreement; denies that said property is unlawfully detained by the defendant; denies that the defendant refuses to perform and carry out the terms of his agreement, but denies that the agreement EXHIBIT "B" attached hereto, has been modified. Defendant admits the said property has not been taken for a tax, assessment

or fine pursuant to a statute, or seized under an execution and attachment against the property of the plaintiff.

VI.

For answer to paragraph VI of the second cause of action set up in the amended complaint, the defendant denies that the rental value of equipment is any sum less than (\$1,250.00) per year; denies that the rental value for a part of a year is equal to a whole year or any sum greater than the percentage the part of the year bears to the whole year. The defendant denies that the plaintiff has been damaged by the defendant's detention of said property, in the sum of \$1,050.00 or any other sum; and denies that the plaintiff will continue to be damaged at said rate during each successive year or fraction thereof at said rate, or any other rate for each said year and fraction of the year, or any other time.

VII.

For answer to paragraph VII of the second cause of action set up in the amended complaint, the defendant denies the allegations therein contained.

VIII.

For answer to paragraph VIII of the second cause of action set up in the amended complaint herein, the defendant admits that the plaintiff made a demand upon the defendant for the return of the property therein mentioned; admits that he has refused to return said property; and admits that he had not returned said property or any part

thereof at the time this cause of action was begun, nor at any other time, except as hereinafter stated.

FOURTH AFFIRMATIVE DEFENSE. [35]

The defendant further answering the second cause of action set up in the amended complaint of the plaintiff herein and by way of affirmative defense, alleges:

I.

That under date of the 28th of March, 1929, the plaintiff and the defendant entered into a contract, a copy of which is attached hereto marked EXHIBIT "B" which is hereby referred to and made a part hereof.

II.

That the agreement referred to in paragraph I hereof, is still in full force and effect and has never been modified, rescinded, or revoked.

III.

Referring to the allegations of paragraph II of the second cause of action embodied in plaintiff's amended complaint where it is alleged that after the agreement of March 28, 1929, had been executed, and on or about September 4, 1929, the agreement of March 28, 1929 was mutually modified, and referring also to the paper writing filed by the plaintiff and marked EXHIBIT "4" which was served upon the defendant by the plaintiff in response to a request for a copy of the agreement, alleged to have been executed on or about September 4, 1929,

by which the previous agreement of March 28, 1929, is alleged to have been mutually modified, the defendant avers as follows:

a) that the paper writing so served upon the defendant as aforesaid, by the plaintiff, is in words and figures as follows, to wit:

EXHIBIT "4"

ELECTRICAL RESEARCH
PRODUCTS, INC.
ACOUSTIC DEPARTMENT.
250 West 57th Street,
New York, N. Y.
Subsidiary of
WESTERN ELECTRIC CO.,
Incorporated

September 4, 1929. [36]

Mr. W. D. Gross,
Coliseum Theatre,
Ketchikan, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of Western Electric Sound Equipment in the Coliseum Theatre at Ketchikan, Alaska.

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agree-

ment be modified by striking out paragraph 6 thereof (which as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

6) IN addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the "Service Day" and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service charge shall not be exceeded, provided however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means of transportation incurred in connection with emergency service visits.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Yours very truly,

R. E. ANDERSON,

Comptroller.

ACCEPTED:

W. D. GROSS

Exhibitor's Signature witnessed by:

J. A. GAGE.

b) That said writing is a mere letter addressed to the defendant by the person whose name is signed to it, and does not constitute a contract between the parties hereto, in that it is not executed by the parties in accordance with the provisions embodied in the contract of March 28, 1929, above referred to, nor was it signed or executed by the parties at all.

c) That the paper writing above set forth in full, does not constitute a contract between the parties, and is void and unenforceable for the reason that the same is without consideration.

d) That the signature of the defendant to said paper writing, as it appears above, was obtained by duress, which [37] consisted in this: At the time said signature was obtained, the defendant had not yet fully paid the plaintiff the full amount of Ten Thousand Five Hundred Dollars (\$10,500.00) to be paid it for installing and supplying the defendant with the equipment, and more fully described in the contract of March 28, 1929, but had fully complied with all the terms of said contract on his part and had already paid thereon all that was then due including the sum of Seven Thousand Three Hundred Forty-two Dollars and fifty cents (\$7,342.50), principal and the interest thereon. That the plaintiff then and there threatened the defendant that unless he signed the paper writing above last set forth in full, in the manner thereon indicated, the plaintiff would immediately disconnect and remove the equipment supplied by it under the

agreement of March 28, 1929, and deprive the defendant of the use thereof, causing him to lose all the monies theretofore paid, and leave him without equipment to operate his theatre. And the agent and employee of the plaintiff, by whom this threat was communicated to the defendant, to wit: J. A. GAGE, told the defendant, then and there, that the plaintiff had power to carry out said threat and could and would do so, under his contract of March 28, 1929. That the defendant was not sufficiently learned in the law to know his rights under the contract of March 28, 1929, and believed the statements so made to him by the representative of plaintiff, in relation to such rights. And the defendant further believed that the plaintiff could and would disconnect and remove from his theatre, the equipment placed there under the contract of March 28, 1929, unless he complied with the request that he sign the paper writing, above referred to, in the manner indicated thereon. That the defendant had a large sum, to wit: many thousand, invested in a theatre building, and in the good will of the business, which said good will would be entirely destroyed if the equipment supplied him under the contract of March 28, 1929, were disconnected or removed. Especially so, since at that time, no other equipment to take its place, could be procured by the defendant, all of which facts were well known to the plaintiff at the time, as well as to the defendant. That the defendant [38] firmly believed that there was no way for him to save

the large sum already paid, or to keep his business from being destroyed, except by complying with the demand of the plaintiff and its agent, that he sign the paper writing above referred to. And so believing, and because of said threats, and not otherwise, the defendant placed his signature upon said writing at the point indicated upon said writing, for the sole purpose of protecting himself and his property against the unlawful threats made by the plaintiff as aforesaid.

IV.

That the defendant has been compelled to employ attorneys to defend this case, and avers: That One Thousand Dollars (\$1,000.00) is a reasonable attorneys' fee for the plaintiff to pay his said attorneys.

FIFTH AFFIRMATIVE DEFENSE.

The defendant further answering said second cause of action set up in the plaintiff's amended complaint, and by way of affirmative defense, alleges:

I.

That the plaintiff wholly failed to comply with the provisions of the contract of March 28, 1929, in that it wholly failed to make the regular periodical inspections and render minor adjustment service, as it was required to do by the terms of said contract. That the plaintiff did not make inspection except that on rare occasions, which occurred at irregular intervals, when the plaintiff

caused some inexperienced and unqualified youths to call at the defendant's theatre. These representatives of the plaintiff, however, did not inspect the equipment, nor did they make any adjustments except to the machinery, the defendant does not know exactly what, which rendered the equipment useless, and put it out of commission, so that the defendant's engineers were compelled to put it back into a state of repair. In this connection, the defendant avers: [39] That the plaintiff never rendered him any regular periodical inspection, nor minor adjustment service. And the defendant avers: That on several occasions since the installation of the equipment furnished by the plaintiff to the defendant the equipment became useless as the result of breakdowns occasioned by defects in the machines and otherwise, and that on each and all of such occasions, the defendant notified the plaintiff by wire, asking that a service man be forthwith dispatched to Juneau to repair the equipment; and that on each and every such occasion, the plaintiff either ignored the request of the defendant in this regard, or sent a service man weeks after the breakdowns had taken place, so that the defendant was obliged to, and did, from the first, hire and keep his own engineers at Ketchikan, who, in every case, made the necessary repairs weeks before the arrival of any service man in the employ of the plaintiff. And in this connection, the defendant further avers: That the plaintiff never sent a service man to Alaska in response to a request for

service, by the defendant, or otherwise, in connection with the servicing of defendant's theatre, but made a pretense to comply with such requests by having service men pass through enroute to the westward and interior of Alaska, to stop off and call at the defendant's theatre while the steamer, on which they were travelling, was in port; and that in all cases, said service men arrived weeks after the repairs which they were supposed to make, had already been made by the defendant's engineers. In this connection, the defendant avers: That the plaintiff never rendered any service to the defendant in connection with the repair or maintenance of the equipment installed, nor did the plaintiff do anything that had the effect or keeping said equipment in running order, or that had the tendency to accomplish this purpose. And in this connection it is alleged that the word "service" when used in connection with equipment by those engaged in the motion picture industry means the service necessary to keep the equipment in repair at all times. [40]

II.

That the defendant has been compelled to employ attorneys to defend this case, and avers: That One Thousand Dollars (\$1,000.00), is a reasonable attorneys' fee for the plaintiff to pay his said attorneys.

SIXTH AFFIRMATIVE DEFENSE.

The defendant further answering said second cause of action, set up in the plaintiff's amended complaint, by way of affirmative defense, alleges:

I.

That all of the machinery, appliances, equipment, and all of the repair parts referred to in the amended complaint and contract therein referred to, a copy of which contract is hereby attached, marked EXHIBIT "B", which is hereby referred to and made a part hereof, were shipped from some place within the United States proper to the Territory of Alaska, and were articles of Interstate Commerce and the plaintiff herein was engaged in Interstate Commerce in making and carrying out said contract.

II.

That the contract referred to in the complaint, a copy of which is attached hereto, marked EXHIBIT "B", is a contract that tends to create a monopoly in the Sound Moving Picture business, and is illegal and void under Section (3) of the Clayton Act, (15 USCA Sec. 14) and Sections 1 and 2 of the Sherman Anti-Trust Act, (15 USCA Sec. 1 and 2 and 3) which contract is void as a whole and especially in the following particulars:

Section 2. * * * The Exhibitor shall not without the written consent of Products, move, alter, change or modify the Equipment, nor add anything thereto, nor take anything therefrom;

* * * nor operate, use or employ the Equipment in any manner in conjunction with any sound record not made under license from Products * * * it is agreed that all renewal parts and assembled parts for the Equipment shall be obtained from Products. * * *

Section 4. * * * Products also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed. Products may from time to time install such spare and renewal parts as may in its opinion be necessary to the satisfactory operation and maintenance of the Equipment. * * * [41]

Section 8. * * * The Exhibitor agrees to pay to Products its list installation charges as from time to time established for any additional Equipment or spare or renewal parts, furnished or supplied by Products, upon delivery thereof, and to pay the transportation charges thereon. The Exhibitor also agrees upon rendition of invoices to pay for the services rendered and expenses incurred by Products' employees in connection with and for the benefit of the Exhibitor for the regular periodical inspection and minor adjustment service hereinbefore provided for.

Section 10. * * * Title to and ownership of all Equipment at any time furnished hereunder and also all tools of all kinds, drawings,

prints and written instructions, remains vested in Products. * * *

Section 12. * * * The Exhibitor will permit Products, through its designated agents, engineers and mechanics, to have access to the Theatre at all reasonable hours, for the purpose of installing, and from time to time for the purpose of examining, and inspecting the Equipment, and will grant to Products full opportunity to make such adjustments therein and repairs thereto as, in the opinion of Products are necessary or desirable. * * *

Which agreement also contains the following provisions:

Section 14. * * * This agreement and the license hereby granted, shall, at the option of Products, terminate and come to an end upon the happening of any of the following events, hereby designated to be events of default, to wit:

b) Upon the failure or refusal of the Exhibitor for any reason to pay any of the items or sums agreed to be paid by it, including the payment of any of the notes provided for in Section (5) hereof, within five days after such item or sum is or may become due, and as to this provision time shall be of the essence.

d) Upon a breach by the Exhibitor of any of the covenants herein contained relative to the use or maintenance of the Equipment, continued for more than fourteen (14) days after

notice thereof by registered mail from Products.

f) Upon the failure of the Exhibitor to accept delivery of the Equipment from the transportation company or common carrier, or to facilitate the work of Products in installing the Equipment.

In the event of a default under any of the provisions of this section at any time during the term of this license, the license hereby granted and all obligations imposed upon Products, by virtue of this agreement, shall, at the option of Products, and whether or not it terminates this license or removes the Equipment as hereinbefore provided, be suspended during the continuance of such default.

Section 15. * * * If this license shall be terminated by default, or if the Exhibitor permits any of the events of default, hereinbefore enumerated, to occur, whether or not Products shall exercise the option to terminate this agreement. Products shall thereupon have the right without notice to take immediate possession of said Equipment, or any part thereof, and for that purpose may pursue the same wherever it or any part thereof may be found and may enter, with the aid and assistance of any person or persons, the Theatre or other premises of the Exhibitor and such place or places whatsoever, whether belonging to the Exhibitor or not in which the equipment or any part thereof

may be placed, and may take and seize the same to its own proper use forever, free from any right of the Exhibitor under this agreement. * * * [42]

Section 22. * * * In addition to all other payments herein provided for, the Exhibitor agrees to pay promptly upon receipt of invoice therefor, Products' charges in connection with the installation of said Equipment which arise by reason of such installations being without the States of the United States. * * *

III.

That Section six (6) set forth in EXHIBIT "4", filed in this cause, taken in connection with the contract of which it is claimed to be a part, is void in that it tends substantially to lessen competition and tends to create a monopoly in this line of commerce under Section (3) of the Clayton Act, (15 USCA. Sec. 14) and Sections 1, 2, and 3, of the Sherman Anti-Trust Act, (15 USCA Sec. 1, 2, and 3.

Which said section six (6) is in words and figures as follows, to-wit:

Section 6. * * * In addition to any other payments required by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly which, for the first two weeks of said term shall be and thereafter throughout the balance of

said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service and inspection payment shall be \$29.75 per week, which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means of transportation incurred in connection with emergency service visits. * * *

That the services contemplated and rendered under Section six (6) aforesaid, and Section four (4) and Section eight (8) of said contract hereinbefore set forth, were not services for the benefit of the defendant, or for the purpose of repairing and keeping the machines and equipment in condition, but were for the purpose of supplying the defendant with additional Equipment and parts whether or not the same were necessary; and were made in order to prevent the defendant from purchasing and using parts and Equipment made by other manufacturers, and were inserted in said contract so that plaintiffs could, and the plaintiffs did, under said provisions, substantially lessen competition and prevent the defendant from using other and different parts than those parts sold of produced by the plaintiffs, and thus tend to create a

monopoly in this line of [43] Commerce, to wit: The Sound Motion Picture business, and the privileges alleged to have been conferred under said Sections were intended to be employed as means and instruments designed to carry out this illegal purpose of the contract above referred to.

THIRD COUNTER CLAIM.

Comes now the defendant and files this, his third counter claim against the plaintiff, and for cause of action on said counter claim the defendant alleges:

I.

That the plaintiff now is, and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Delaware, doing business in the Territory of Alaska, under and by virtue of the laws thereof.

II.

That the defendant is, and at all times hereafter mentioned, was the owner of a motion picture theatre in the City of Ketchikan, which said theatre is known as the Coliseum Theatre.

III.

That for the purpose of equipping said Theatre, the defendant did, on the 28th day of March, 1929, enter into a written contract with the plaintiff, a copy of which said contract is attached hereto, marked EXHIBIT "B" and is hereby referred to and made a part hereof.

IV.

That under the provisions of the contract above referred to, the plaintiff did install, in the defendant's Coliseum Theatre at Ketchikan, the equipment described in said contract as the equipment which the plaintiff agreed to install in accordance with the terms of said contract. And the defendant paid to the plaintiff, the full sum of Ten Thousand Five Hundred Dollars (\$10,500.00), as principal, and interest thereon, in accordance with provisions of said contract, and in addition, thereto, paid the sum of One Hundred and Eighty-four Dollars and eighty-three cents (\$184.83), freight on said Equipment, and the further sum of Twenty-one Dollars (\$21.00) cartage on the same and complied with [44] said contract in all respects.

V.

That pursuant to the installation of said equipment, the defendant used the same in connection with the operation of his theatre, and did so operate his theatre, and so employ said equipment, that he built up a lucrative business and established a good will and reputation for his said theatre, which had a money value of Fifty Thousand Dollars (\$50,000.00).

VI.

That the plaintiff did, on the 20th day of April, 1931, commence the proceeding in this court, with the view of replevining the equipment installed under the aforesaid contract of March 28, 1929, EXHIBIT "B". And the plaintiff did, then and

there, replevin said equipment and take the same from the possession of the defendant and deprive the defendant of the use thereof, and transport said equipment to some point without the Territory of Alaska. Which said proceeding was instituted, maintained, and carried on for the sole purpose of coercing the defendant to pay monies not due and owing by him to the plaintiff, and were instituted, carried on, and maintained in violation of the contract of March 28, 1929.

VII.

That because of the removal of the equipment from the defendant's Coliseum Theatre on April 28th, 1931, as aforesaid, the defendant was obliged to close down his theatre until new and other equipment could be installed, and defendant on account of said removal was compelled to keep his said Theatre closed on April 28th, 1931.

VIII.

That because of the acts of the plaintiff in so removing the equipment installed under the contract of March 29, 1929, compelling the theatre to be closed temporarily, and compelling the defendant to procure other equipment, the business of the defendant at his Coliseum Theatre at Ketchikan, was greatly injured, and the profits therefrom were reduced more than Two [45] Thousand Dollars (\$2,000.00), per month, and the good will of the business was injured in an amount exceeding Twen-

ty-five Thousand Dollars (\$25,000.00); and the defendant was compelled, in order to keep his theatre going at all, and prevent a total loss of his entire business and good will, to pay out the sum of Four Thousand Four Hundred and Fifty-six Dollars (\$4,456.00), in order to procure the installation of other equipment, which other equipment was procured by the defendant, with as much speed as possible, and was, and is the best obtainable, although less efficient than the equipment removed by the plaintiff, and so inferior thereto as to cause a loss of profits from operations of defendant's said theatre to the extent of Two Thousand Dollars (\$2,000.00) per month, as aforesaid, which monthly loss has continued from the removal of the equipment above referred to, to May 1, 1933, 24 months and 2 days.

IX.

That the rental value of the equipment so wrongfully removed from the defendant's Coliseum Theatre at Ketchikan by the plaintiff, for the unexpired term of the lease embodied in the agreement of March 28, 1929, is Nine Thousand Six Hundred Forty-eight Dollars sixty-five cents (\$9,648.65), Ninety-nine Dollars and thirteen cents (\$99.13) per month for 97 $\frac{1}{3}$ months with interest thereon from April 28, 1929, 1931, and the plaintiff replevined additional parts belonging to the defendant, of the value of Four Hundred Fifty Dollars (\$450.00). That by reason of the premises, the defendant has been damaged in the above amounts.

FOURTH COUNTER CLAIM.

And now comes the defendant and presents this, his fourth counter claim herein, and for his fourth counter claim alleges:

I.

That the plaintiff now is, and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Delaware, doing business in the [46] Territory of Alaska, under and by virtue of the laws thereof.

II.

That the defendant is, and at all times hereafter mentioned, was the owner of a motoin picture theatre in the City of Ketchikan, which said theatre is known as the Coliseum Theatre.

III.

That for the purpose of equipping said theatre, the defendant did, on the 28th day of March, 1929, enter into a written contract with the plaintiff, a copy of which said contract is attached hereto, marked EXHIBIT "B" and is hereby referred to and made a part hereof.

IV.

That under the provisions of the contract above set forth, the plaintiff did install, in the defendant's Coliseum Theatre at Ketchikan, the equipment described in said contract as the equipment which the plaintiff agreed to install in accordance

with the terms of said contract. And the defendant paid to the plaintiff, the full sum of Ten Thousand Five Hundred Dollars (\$10,500.00), as principal, and interest in accordance with provisions of said contract and in addition thereto, paid the sum of One Hundred Eighty-four Dollars eighty-three cents (\$184.83), freight, and Twenty-one Dollars (\$21.00), cartage on said equipment.

V.

That on or about the 30th day of December, 1929, the plaintiff threatened to remove and take from the possession of the defendant, all the equipment heretofore installed by it in the Coliseum Theatre, as aforesaid, and deprive the defendant of the use thereof unless the defendant paid the plaintiff the sum of Nine Hundred Fifty-seven Dollars and sixty cents (\$957.60), which defendant had not contracted to pay, and which was not due plaintiff for pretended services, which the plaintiff never rendered, and told the defendant then and there that it had the power and authority to carry out its said threats, and would do [47] so if said amount were not immediately paid. That at the time said threat was made to the defendant he had not yet fully paid the Ten Thousand Five Hundred Dollars (\$10,500.00), due the plaintiff under the contract of March 28, 1929, although all payments due on account thereof had been paid, and the defendant was cognizant of the fact that a removal of said equipment would ruin his business, destroy the good will he had

established, and result in financial losses. The defendant not being sufficiently learned in the law to know his rights under the contract of March 28, 1929, and believing that the plaintiff had the power to carry out its said threats, and would carry out its said threats, then and there paid the plaintiff the sum of Nine Hundred Fifty-seven Dollars and sixty cents (\$957.60) because of the threats so made by the plaintiff, and under duress, as aforesaid. And thereafter the plaintiff, continued to threaten the defendant that unless he paid further amounts it would disconnect the equipment, and the defendant believing that the plaintiff could and would carry out its threats paid the plaintiff the following amounts: February 10, 1930 \$119.00; April 2, 1930, \$238.00; November 1, 1930, \$208.25; making a total of \$1,525.85.

VI.

That by reason of the premises there is now due and owing from the plaintiff to the defendant, the sum of One Thousand Four Hundred Sixty Dollars and ninety-three cents (\$1,460.93); with interest thereon at 8% per annum from the dates the payments were made, which said sums have not been paid to the defendant, nor any part thereof.

VII.

That the defendant has been compelled to employ attorneys to prosecute this case and avers: That Two Hundred Fifty Dollars (\$250.00), is a reason-

able attorneys' fee for the plaintiff to pay his said attorneys.

WHEREFORE, the defendant prays judgment against the plaintiff as follows: [48]

I.

That plaintiff's first cause of action be dismissed, and that the defendant have judgment for One Thousand Dollars (\$1,000.00), attorneys' fee.

II.

That the defendant have judgment on his first counter claim, for the return of the property taken from the defendant by virtue of the writ, being the equipment furnished the defendant under contract EXHIBIT "A", including extra parts; (\$9,627.03) for prepaid rent together with interest thereon from April 20, 1931, at 8% per annum; (\$48,666.66) for loss of profits; (\$25,000.00) for injury to the good will; and (\$3,000.00) attorneys' fee; and in case the return of said property cannot be had for the value thereof; prepaid rent (\$9,626.03); extra parts (\$450.00) with interest on (\$10,077.67) from April 20, 1931 at 8%; (\$48,666.66) loss of profits; (\$25,000.00) loss to the good will and (\$3,000.00) attorneys' fee; four thousand four hundred fifty-one (\$4451.00) Dollars expenses incurred in connection with the purchase of new equipment to save the business from utter loss as alleged herein.

III.

That the defendant have judgment against the plaintiff on his second counter claim, in the sum of One Thousand Five Hundred Twenty-four Dollars twenty-five cents (\$1,524.25) with interest from November 1, 1930 at 8%; and Two Hundred Fifty Dollars (\$250.00) attorneys' fee.

IV.

That plaintiff's second cause of action be dismissed, and that the defendant have judgment for One Thousand Dollars (\$1,000.00) attorneys' fee.

V.

That the defendant have judgment on his third counter claim for the return of the property taken from the defendant by virtue of the writ of replevin herein referred to, being the equipment furnished the defendant under contract EXHIBIT "B" [49] including extra parts: (\$9,648.65), for prepaid rent together with interest thereon at 8% per annum from April 28, 1931; (\$48,133.30), damages for loss of profits; (\$25,000.00) loss of good will; and (\$3,000.00) attorneys' fee; or in case return of said property cannot be had, judgment for the value thereof, towit: (\$9,648.65), for prepaid rent, (\$450.00) for extra parts with interest on (\$10,098.65) from April 28, 1931, at 8% per annum; (\$48,133.33) loss of profits; (\$25,000.00), loss of good will and (\$3,000.00) attorneys' fee; four thousand four hundred fifty one (\$4,451.00) Dollars, expenses

incurred in connection with the purchase of new equipment to save the business from utter loss as alleged herein.

That defendant have judgment against the plaintiff on his fourth counter claim in the sum of One Thousand Five Hundred Twenty-five Dollars and eight-five cents (\$1,525.85) with interest thereon at 8% from November 1, 1930.

VII.

That the defendant have judgment against the plaintiff for his costs and disbursements herein incurred.

HELLENTHAL & HELLENTHAL

Address: 3rd Floor, over First
National Bank, Juneau, Alaska.

H. L. FAULKNER

Address: First Nat'l Bank Bldg.,
Second Floor, Juneau, Alaska.[50]

United States of America
Territory of Alaska—ss.

W. D. GROSS, being first duly sworn on oath deposes and says: That he has heard the foregoing answer read and knows the contents thereof; and that the same is true as he verily believes:

W. D. GROSS

Subscribed and sworn to before me this 27 day of March, 1934.

[Seal]

SIMON HELLENTHAL

Notary Public for Alaska. My commission expires 2/4/38.

Copy of the foregoing answer received this 27
day of March, 1934.

R. E. ROBERTSON
Attorney for the Plaintiff.

[Endorsed]: Filed Mar. 28, 1934. [51]

[Title of Court and Cause.]

DEMURRER TO AMENDED ANSWER.

Comes now the plaintiff herein and demurs to defendant's amended answer herein as amended, as follows, to-wit:

1. Plaintiff demurs to the First, Second, Third, Fourth, Fifth and Sixth Affirmative Defenses, and to each of them, contained in said amended answer, on the ground that upon the face thereof neither of them constitute a defense because neither of them state facts sufficient to constitute a defense to plaintiff's amended complaint herein.

2. Plaintiff demurs to the First, Second, Third and Fourth Counterclaims, and to each or them, contained in said amended answer, upon the ground that neither of them constitute a counterclaim because neither of them state facts sufficient to constitute a counterclaim to plaintiff's amended complaint herein, and because there is another action pending between the same parties for the same cause, namely, each of said counterclaims are asserted and relied upon by defendant in that certain suit now pending in this court, numbered and titled

upon the records and docket of this court, "No. 3158-A, Electrical Research Products, Inc., Plaintiff, vs. W. D. Gross, Defendant," wherein the first counterclaim in defendant's amended answer therein is the same as the First Counterclaim in defendant's amended answer herein, and wherein the Second Counterclaim in defendant's amended answer therein is the same as the Second Counterclaim in defendant's amended answer herein, and wherein the Third Counterclaim in defendant's amended answer therein is the same as the Third Counterclaim in defendant's amended answer herein, and wherein the Fourth Counterclaim in defendant's amended answer therein is the same as the Fourth Counterclaim in defendant's amended answer herein. [52]

Respectfully Submitted,

HENRY RODEN

R. E. ROBERTSON

Attorneys for Plaintiff.

Copy received January 18, 1935.

J. A. HELLENTHAL

Attorney for Defendant.

[Endorsed]: Filed Jan. 19, 1935. [53]

[Title of Court and Cause.]

ORDER.

Now on this day plaintiff's demand for a Bill of Particulars for defendant's specification of vari-

ous items mentioned or referred to in his Amended Answer herein as amended, and plaintiff's motion against defendant's Amended Answer herein as amended, and plaintiff's demurrer to defendant's Amended Answer herein as amended, each coming regularly on for hearing, and the Court being now fully advised in the premises, it is hereby ordered that said demand for a Bill of Particulars be and it is hereby disallowed, to which plaintiff excepts and its exception is allowed, and that plaintiff's said motion be and it is hereby overruled, to which plaintiff excepts and its exception is hereby allowed, and that plaintiff's said demurrer be and it is hereby denied, to which plaintiff excepts and its exception is hereby allowed.

Done in open court this 19th day of January, 1935.

GEO. F. ALEXANDER

District Judge.

[Endorsed]: Filed Jan. 19, 1935. [54]

[Title of Court and Cause.]

REPLY TO AMENDED ANSWER
AS AMENDED.

Comes now the plaintiff and for reply to defendant's Amended Answer herein contained, as amended, admits, denies and alleges, namely:

Replying to defendant's First Affirmative Defense to the First Cause of Action contained in

plaintiff's Amended Complaint herein, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits the allegations contained in Paragraph I thereof.

II.

Plaintiff denies each and every allegation contained in Paragraph II of said First Affirmative Defense, and plaintiff alleges that that certain contract made and entered into by the parties hereto on March 28, 1929, a substantial copy whereof, marked Exhibit A, is attached to defendant's said Amended Answer, was, after its execution, mutually modified by that certain subsequent agreement made and entered into by the parties hereto under date of September 4, 1929, a substantial copy whereof is set in Paragraph III of said First Affirmative Defense.

III.

Plaintiff admits that the document, designated as Exhibit 2, set forth in Paragraph III of said First Affirmative Defense, is a substantial copy of that certain agreement made and entered into by and between the parties hereto under date of September 4, 1929, and alleges that the aforesaid agreement of March 28, 1929, was mutually modified by the parties hereto by said subsequent agreement, Exhibit 2, of September 4, 1929; plaintiff denies each and every allegation of Sections b and c, contained in said Paragraph III, plaintiff denies each

and every allegation of [55] Section d, contained in said Paragraph III, and plaintiff denies that defendant, at the time defendant executed said agreement of September 4, 1929, had fully paid plaintiff the sums theretofore becoming or then due plaintiff under either said contract of March 28, 1929, or under that contract as modified by said contract dated September 4, 1929, and plaintiff denies each and every other allegation in said Paragraph III contained.

IV.

Plaintiff denies each and every allegation contained in Paragraph IV of said First Affirmative Defense.

Replying to defendant's second Affirmative Defense to the First Cause of Action, contained in plaintiff's Amended Complaint herein, plaintiff admits, denies and alleges, namely:

I.

Plaintiff not only denies that it failed to make the periodical inspections and render the minor adjustment services as agreed by it in that certain contract of March 28, 1929, a copy whereof is attached to defendant's said Amended Answer, marked Exhibit 1, as modified by that certain agreement bearing date of September 4, 1929, a copy whereof, marked Exhibit 2, is set forth in defendant's said Amended Answer, but also denies that said contracts or either of them required plaintiff

to make regular periodical inspections or to render regular periodical minor adjustment services, and plaintiff denies that the word "service" when used in connection with equipment, by those engaged in the motion picture industry, means the service necessary to keep the equipment in repair at all times, and plaintiff further denies each and every other allegation contained in defendant's said Second Affirmative Defense to the First Cause of Action contained in plaintiff's Amended Complaint herein.

Replying to defendant's Third Affirmative Defense to the First Cause of Action contained in plaintiff's Amended Complaint herein, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits that the machinery, appliances, equipment and repair parts, mentioned in plaintiff's Amended [56] Complaint herein and in that certain contract of March 28, 1929, a substantial copy whereof, marked Exhibit A, is attached to defendant's said Amended Answer, were shipped from a point within the United States to the Territory of Alaska, and denies each and every other allegation in said Paragraph I contained.

II.

Plaintiff denies each and every allegation contained in Paragraphs II and III of said Third Affirmative Defense.

Replying to defendant's First Counterclaim contained in his said Amended Answer, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits Paragraph I thereof.

II.

Plaintiff admits Paragraph II thereof.

III.

Plaintiff, in replying to Paragraph III thereof, admits that on March 28, 1929, the parties hereto entered into that certain written contract, a substantial copy whereof is attached to said Amended Answer and marked Exhibit A, but alleges that said contract was made subject to the agreement that the weekly charge to be made by plaintiff for the periodical services therein mentioned and to be paid therefor by defendant to plaintiff had not been but should be later established by mutual agreement, which mutual agreement was thereafter made between the parties hereto and reduced to writing in that certain agreement bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 2, is set forth in defendant's said Amended Answer.

IV.

Plaintiff denies each and every allegation contained in Paragraph IV thereof, except it admits that in accordance with said contract of March 28, 1929, which was subsequently modified by the par-

ties hereto by that certain contract of September 4, 1929, a substantial copy whereof is set forth in said Amended Answer, plaintiff duly installed said equipment in defendant's said theatre. [57]

V.

Plaintiff admits that, after the installation of said equipment, defendant used said equipment in the operation of his Coliseum Theatre in Juneau, Alaska, but plaintiff denies each and every other allegation in said Paragraph V contained.

VI.

Plaintiff denies each and every allegation contained in Paragraph VI thereof, except plaintiff admits that it instituted this suit on or about April 20, 1931, in this court and that thereafter it duly replevined said equipment and that subsequently but more than three days thereafter it transported said equipment to a point outside the Territory of Alaska.

VII.

Plaintiff denies each and every allegation contained in Paragraph VII thereof.

VIII.

Plaintiff denies each and every allegation contained in Paragraph VIII thereof.

IX.

Plaintiff denies that it replevined any additional parts or any property whatsoever belonging to de-

fendant, and it further denies that the rental value of the equipment for the unexpired term under the aforesaid contract of March 28, 1929, is \$9,627.03, or any other sum other than the amount as specified in the aforesaid contract of March 28, 1929, and plaintiff denies each and every other allegation contained in said Paragraph IX thereof.

X.

Plaintiff denies each and every allegation contained in Paragraph X of said First Counterclaim.

Replying to defendant's Second Counterclaim contained in his said amended Answer, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits Paragraph I thereof.

II.

Plaintiff admits Paragraph II thereof. [58]

III.

Plaintiff, in replying to Paragraph III thereof, admits that on March 28, 1929, the parties hereto entered into that certain written contract, a substantial copy whereof is attached to said Amended Answer and marked Exhibit A, but alleges that said contract was made subject to the agreement that the weekly charge to be made by plaintiff for the periodical services therein mentioned and to be paid therefor by defendant to plaintiff had not then been but should be later established by mutual

agreement, which mutual agreement was thereafter made between the parties hereto and reduced to writing in that certain agreement bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 2, is set forth in defendant's Amended Answer.

IV.

Plaintiff denies each and every allegation contained in Paragraph IV thereof, except it admits that thereafter plaintiff duly installed, in accordance with said agreements, said equipment in defendant's said theatre.

V.

Plaintiff denies each and every allegation contained in Paragraph V of said Second Counterclaim, except that it admits that defendant had not on or about December 30, 1929, fully paid the said sum of \$10,500.00, due to plaintiff from defendant under the aforesaid contract of March 28, 1929, and plaintiff admits that on or about December 30, 1929, defendant paid plaintiff the sum of \$1,011.50, in payment of weekly charges for periodical services theretofore rendered by plaintiff to defendant under the aforesaid contract of March 28, 1929, as modified by that certain agreement dated September 4, 1929, a substantial copy whereof is set forth in defendant's said Amended Answer, and marked Exhibit 2, and that thereafter and on or about February 10, 1930, defendant paid plaintiff the sum of \$119.00 for like service likewise so rendered by

plaintiff to defendant, and thereafter and on or about April 3, 1930, defendant paid plaintiff the sum of \$238.00 for like services likewise so rendered by plaintiff to defendant, and thereafter and on or about November 1, 1930, defendant paid plaintiff the sum of \$208.25 [59] for like services likewise so rendered by plaintiff to defendant.

VI.

Plaintiff denies each and every allegation contained in Paragraph VI of said Second Counterclaim.

VII.

Plaintiff denies each and every allegation contained in Paragraph VII of said Second Counterclaim.

FIRST AFFIRMATIVE REPLY.

And, as a further and separate Affirmative Reply not only to defendant's First, Second and Third Affirmative Defenses, to the First Cause of Action contained in plaintiff's Amended Complaint herein, but also to defendant's First and Second Counterclaim contained in his said Amended Answer, plaintiff alleges:

I.

That on or about March 28, 1929, the parties hereto made and entered into that certain agreement bearing that date, a substantial copy of which, marked Exhibit A, is attached to said Amended Answer; that at the time of the execution of said

contract said parties mutually agreed that the weekly charge for the services to be rendered thereunder by plaintiff for periodical inspections and minor adjustments had not been established, and that the amount thereof should be later determined and mutually agreed upon by the parties hereto; that thereafter and under date of September 4, 1929, the parties hereto mutually made and entered into the aforesaid agreement of the last named date, a substantial copy whereof, marked Exhibit 2, is set forth in defendant's said Amended Answer, for the purpose of establishing the weekly charge that plaintiff should make and which defendant should pay plaintiff for the periodical services to be rendered by plaintiff under the aforesaid contract of March 28, 1929; that said agreement was actually executed by defendant on or about December 30, 1929, at which time he ratified said agreement by voluntarily paying to plaintiff the weekly charge therein established for the period from the time of the installation of the equipment, mentioned in the aforesaid contract of March 28, 1929, up and until the date of said payment, and which agreement *he* further ratified thereafter from time to time not only by permitting plaintiff to continue to [60] render said services, but also by accepting said services, up and until the time of the bringing of this suit and also by voluntarily paying plaintiff the weekly charge therein established for each week up to and including the week ending May 17, 1930; that plaintiff fully and faithfully performed all the terms of each of said contracts.

SECOND AFFIRMATIVE REPLY.

And, as a further and separate Affirmative Reply to defendant's First and Second Affirmative Defenses to the First Cause of Action contained in plaintiff's Amended Complaint, plaintiff alleges:

I.

That that certain agreement, bearing date of September 4, 1929, a substantial copy whereof is pleaded in said Answer and designated as Exhibit 2, was duly signed and executed by the defendant in person in Seattle, Washington, on or about December 30, 1929, and was duly signed and executed by the authorized officer and agent of plaintiff in New York City on or about September 4, 1929, and was executed by said parties for the purpose of modifying that certain agreement theretofore mutually made by them under date of March 28, 1929, a substantial copy whereof, marked Exhibit A, is attached to defendant's said Amended answer, wherein, by agreement between said parties, the amount of the weekly charge that plaintiff should make and that defendant should pay plaintiff for periodical services to be rendered by plaintiff was not inserted but was left to be later established by mutual agreement of the parties hereto.

THIRD AFFIRMATIVE REPLY.

And, as a further and separate Affirmative Reply to defendant's Third Affirmative Defense to the First Cause of Action, contained in plaintiff's Amended Complaint herein, plaintiff alleges:

I.

That that certain contract, made by the parties herein on March 28, 1929, a substantial copy whereof, marked Exhibit A, is attached to defendant's Amended Answer as modified by that certain [61] contract bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 2, is pleaded in defendant's said Amended Answer, is separable and divisible in that the provisions thereof, relative to the periodical inspection and minor adjustment services to be rendered thereunder by plaintiff to defendant and for which defendant agreed to pay plaintiff the sum of \$29.75 per week, are entirely distinguishable from and not dependent upon the provisions of said contract as so modified with respect to the repair parts therein mentioned to be furnished by plaintiff to defendant at his request, and that said services were for labor only and were furnished and to be paid for irrespective of whether or not plaintiff furnished to defendant or defendant obtained from plaintiff any repair parts for the moving picture equipment that plaintiff furnished to defendant under said contract.

FOURTH AFFIRMATIVE REPLY.

And, as a further and separate Affirmative Reply to defendant's First Counterclaim, contained in his said Amended Answer, plaintiff alleges:

I.

That plaintiff did not replevin or cause to be replevined any of the equipment mentioned in defendant's First Counterclaim nor did plaintiff take or cause to be taken any of said equipment from the possession of defendant, nor did plaintiff deprive defendant of the use of said equipment, nor did plaintiff transport any of said equipment to any point without the Territory of Alaska until after the commencement of this suit; that none of said acts were in existence or had been done at the time of the commencement of this suit.

FIFTH AFFIRMATIVE REPLY.

And, as a further and separate Affirmative Reply to defendant's First Counterclaim, contained in his said Amended Answer, plaintiff alleges:

I.

That prior to the institution of the aforesaid suit, numbered and entitled on the records and dockets of this Court as [62] No. 3167-A, Electrical Research Products, Inc., a corporation, Plaintiff, vs. W. D. Gross, Defendant, defendant, in violation of the terms of that certain contract of March 28, 1929, a substantial copy whereof is attached to defendant's said Amended Answer, marked Exhibit A, as modified by that certain contract bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 2, is set forth in defendant's said amended Answer, both of which contracts were

mutually entered into by and between the parties hereto, had obtained and placed in his Coliseum Theatre, in Juneau, Alaska, certain talking moving picture and equipment, and threatened to and was preparing to install it in his said theatre and to discard and reject all of the equipment that had been supplied to him by the plaintiff under the provisions of the aforesaid contracts, and that he installed such other equipment in his theatre on the same day whereupon plaintiff, in pursuance to a writ of replevin, duly issued out of this court in the above-mentioned action, caused the same to be replevined.

SIXTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's First and Second Affirmative Defenses to the First Cause of Action, contained in plaintiff's Amended Complaint herein, and to defendant's Third Affirmative Defense to the First Cause of Action, contained in plaintiff's Amended Complaint herein, and to defendant's First and Second Counterclaims, contained in his said Amended Answer, plaintiff alleges:

I.

. That on or about March 28, 1929, the parties hereto made and entered into that certain agreement bearing that date, a substantial copy of which, marked Exhibit A, is attached to said Amended

Answer; that at the time of the execution of said contract said parties mutually agreed that the weekly charge for the services to be rendered thereunder by plaintiff for periodical inspections had not been established, and that the amount thereof should be later determined and mutually agreed upon by the parties hereto; that thereafter and under date of September 4, 1929, in pursuance to said agreement and for the purpose of modifying [63] thereby said previous agreement of March 28, 1929, and to establish the weekly charge that plaintiff should make and which defendant should pay plaintiff for the periodical services to be rendered by plaintiff under the aforesaid contract of March 28, 1929, the parties hereto mutually made and entered into that certain agreement, a substantial copy whereof, marked Exhibit 2, is set forth in defendant's said Amended Answer; that said last mentioned agreement was actually executed by defendant in person on or about December 30, 1929.

II.

That plaintiff, in reliance upon said agreement of March 28, 1929, as so modified by said agreement bearing date September 4, 1929, rendered and performed, at its own cost, periodical inspection and minor adjustment services to defendant in respect to his Coliseum Theatre in Juneau, Alaska, at all times from and after the installation by defendant in said theatre of that certain moving picture equipment furnished to defendant by plaintiff under said

agreement of March 28, 1929, not only up and until December 30, 1929, on which date defendant executed said supplemental agreement of September 4, 1929, but also thereafter from said December 30, 1929, up and until March 7, 1931, and also offered and was willing so to do, but was prevented by defendant therefrom, thereafter and up to April 20, 1931; that plaintiff fully and faithfully performed all the terms of each of said contracts.

III.

That defendant at all of said times knew that plaintiff was rendering and performing said services in reliance upon defendant's performance of the terms of the aforesaid contracts, and defendant, so knowing, accepted said services and permitted them to be rendered and performed by plaintiff; that by his said acceptance of said services in pursuance to said agreements, defendant is estopped from now claiming that either of said agreements were null and void in respect to the services so rendered to defendant by plaintiff thereunder and for none of which services, so rendered and [64] performed subsequent to May 17, 1930, has defendant ever paid plaintiff anything whatsoever.

Replying to that certain Defense which is directed to the Second Cause of Action contained in plaintiff's Amended Complaint and which is denominated "Fourth Affirmative Defense" in defendant's said Amended Answer, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits the allegations contained in Paragraph I, thereof.

II.

Plaintiff denies each and every allegation contained in Paragraph II of Fourth Affirmative Defense, and plaintiff alleges that that certain contract made and entered into by the parties hereto on March 28, 1929, a substantial copy whereof, marked Exhibit B, is attached to defendant's said Amended Answer, was, after its execution, mutually modified by that certain subsequent agreement made and entered into by the parties hereto under date of September 4, 1929, a substantial copy whereof is set forth in Paragraph III of said Fourth Affirmative Defense.

III.

Plaintiff admits that the document, designated as Exhibit 4, set forth in Paragraph III of said Fourth Affirmative Defense, is a substantial copy of that certain agreement made and entered into by and between the parties hereto under date of September 4, 1929, and alleges that the aforesaid agreement of March 28, 1929, was mutually modified by the parties hereto by said subsequent agreement, Exhibit 4, of September 4, 1929; plaintiff denies each and every allegation of Sections b and c, contained in said Paragraph III; plaintiff denies each and every allegation of Section d, contained in said Paragraph III, and plaintiff denies that defendant, at the time defendant executed said agreement of

September 4, 1929, had fully paid plaintiff the sums theretofore becoming or then due plaintiff under either said contract of March 28, 1929, or under that contract as modified by said contract dated September 4, 1929, and plaintiff denies each and every allegation in said Paragraph III contained. [65]

IV.

Plaintiff denies each and every allegation contained in Paragraph IV of said Fourth Affirmative Defense.

Replying to that certain affirmative defense which is directed to the Second Cause of Action contained in plaintiff's Amended Complaint and which is designated as "Fifth Affirmative Defense" in defendant's said Amended Answer, plaintiff admits, denies and alleges, namely:

I.

Plaintiff not only denies that it failed to make the periodical inspections and render the minor adjustment services as agreed by it in that certain contract of March 28, 1929, a copy whereof is attached to defendant's said Amended Answer, marked Exhibit B, as modified by that certain agreement bearing date of September 4, 1929, a substantial copy whereof, marked Exhibit 4, is set forth in defendant's said Amended Answer, but also denies that said contracts or either of them required plaintiff to make regular periodical inspections or to render regular periodical minor adjustment services, and

plaintiff denies that the word "service" when used in connection with equipment, by these engaged in the motion picture industry, means the service necessary to keep the equipment in repair at all times, and plaintiff further denies each and every other allegation contained in defendant's said Fifth Affirmative Defense.

Replying to that certain affirmative defense which is directed to the Second Cause of Action contained in plaintiff's Amended Complaint and which is denominated "Sixth Affirmative Defense" in defendant's said Amended Answer, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits that the machinery, appliances, equipment and repair parts, mentioned in plaintiff's Amended Complaint herein and in that certain contract of March 28, 1929, a substantial copy whereof, marked Exhibit B, is attached to defendant's said Amended Answer, were shipped from [66] a point within the United States to the Territory of Alaska, and denies each and every other allegation in said Paragraph I contained.

II.

Plaintiff denies each and every allegation contained in Paragraph II and III of said Sixth Affirmative Defense.

Replying to defendant's Third Counterclaim contained in his said Amended Answer, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits Paragraph I thereof.

II.

Plaintiff admits Paragraph II thereof.

III.

Plaintiff, in replying to Paragraph III thereof, admits that on March 28, 1929, the parties hereto entered into that certain written contract, a substantial copy whereof is attached to said Amended Answer and marked Exhibit B, but alleges that said contract was made subject to the agreement that the weekly charge to be made by plaintiff for the periodical services therein mentioned and to be paid therefor by defendant to plaintiff had not then been but should be later established by mutual agreement, which mutual agreement was thereafter made between the parties hereto and reduced to writing in that certain agreement bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 4, is set forth in defendant's said Amended Answer.

IV.

Plaintiff denies each and every allegation contained in Paragraph IV thereof, except it admits that in accordance with said contract of March 28, 1929, which was subsequently modified by the parties hereto by that certain contract of September 4, 1929, a substantial copy whereof is set forth in said Amended Answer, plaintiff duly installed said equipment in defendant's said theatre.

V.

Plaintiff admits that, after the installation of said [67] equipment, defendant used said equipment in the operation of his Coliseum Theatre in Ketchikan, Alaska, but plaintiff denies each and every other allegation in said Paragraph V contained.

VI.

Plaintiff denies each and every allegation contained in paragraph VI thereof, except plaintiff admits that it instituted this suit on or about April 20, 1931, in this court and that thereafter it duly replevined said equipment and that subsequently but more than three days thereafter it transported said equipment to a point outside the Territory of Alaska.

VII.

Plaintiff denies each and every allegation contained in Paragraph VII thereof.

VIII.

Plaintiff denies each and every allegation contained in Paragraph VIII thereof.

IX.

Plaintiff denies that it replevined any additional parts or any property whatsoever belonging to defendant, and it further denies that the rental value of the equipment for the unexpired terms under the aforesaid contract of March 28, 1929, is \$9,648.65, or any other sum other than the amount

as specified in the aforesaid contract of *of* March 28, 1929, and plaintiff denies each and every other allegation contained in said Paragraph IX thereof.

Replying to defendant's Fourth Counterclaim contained in his said Amended Answer, plaintiff admits, denies and alleges, namely:

I.

Plaintiff admits Paragraph I thereof.

II.

Plaintiff admits Paragraph II thereof.

III.

Plaintiff, in replying to Paragraph III thereof, admits that on March 28, 1929, the parties hereto entered into that certain written contract, a substantial copy whereof is attached to said amended Answer and marked Exhibit B, but alleges that said [68] contract was made subject to the agreement that the weekly charge to be made by plaintiff for the periodical services therein mentioned and to be paid therefor by defendant to plaintiff had not then been but should be later established by mutual agreement, which mutual agreement was thereafter made between the parties hereto and reduced to writing in that certain agreement bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 4, is set forth in defendant's said Amended Answer.

IV.

Plaintiff denies each and every allegation contained in Paragraph IV thereof, except that it admits that thereafter plaintiff duly installed, in accordance with said agreements, said equipment in defendant's said theatre.

V.

Plaintiff denies each and every allegation contained in Paragraph V of said Fourth Counterclaim, except that it admits that defendant had not on or about December 30, 1929, fully paid the said sum of \$10,500.00, due to plaintiff from defendant under the aforesaid contract of March 28, 1929, and plaintiff admits that on or about December 30, 1929, defendant paid plaintiff the sum of \$952.00, in payment of the weekly charges for periodical services theretofore rendered by plaintiff to defendant under the aforesaid contract of March 28, 1929, as modified by that certain agreement dated September 4, 1929, a substantial copy whereof is set forth in defendant's said Amended Answer, and marked Exhibit 4, and that thereafter and on or about February 10, 1930, defendant paid plaintiff the sum of \$119.00 for like services likewise so rendered by plaintiff to defendant, and thereafter and on or about April 3, 1930, defendant paid plaintiff the sum of \$238.00 for like services likewise so rendered by plaintiff to defendant, and thereafter and on or about November 1, 1930, defendant paid plaintiff

the sum of \$208.25 for like services likewise so rendered by plaintiff to defendant. [69]

VI.

Plaintiff denies each and every allegation contained in Paragraph VI of said Fourth Counterclaim.

VII.

Plaintiff denies each and every allegation contained in Paragraph VII of said Fourth Counterclaim.

SEVENTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply not only to defendant's Fourth, Fifth and Sixth Affirmative Defenses but also to defendant's Third and Fourth Counterclaims contained in his said Amended Answer, plaintiff alleges, namely:

I.

That on or about March 28, 1929, the parties hereto made and entered into that certain agreement bearing that date, a substantial copy of which, marked Exhibit B, it attached to said Amended Answer; that at the time of the execution of said contract said parties mutually agreed that the weekly charge for the services to be rendered thereunder by plaintiff for periodical inspections and minor adjustments had not been established, and that the amount thereof should be later determined and mutually agreed upon by the parties hereto; that thereafter and under date of September 4, 1929,

the parties hereto mutually made and entered into the aforesaid agreement of the last named date, a substantial copy whereof, marked Exhibit 4, is set forth in defendant's said Amended Answer, for the purpose of establishing the weekly charge that plaintiff should make and which defendant should pay plaintiff for the periodical services to be rendered by plaintiff under the aforesaid contract of March 28, 1929; that said agreement was actually executed by defendant on or about December 30, 1929, at which time he ratified said agreement by voluntarily paying to plaintiff the weekly charge therein established for the period from the time of the installation of the equipment, mentioned in the aforesaid contract of March 28, 1929, up and until the date of said payment, and which agreement he further ratified thereafter from time to time not only by permitting plaintiff to continue to render said services but also by accepting said services up and [70] until the time of the bringing of this suit and also by voluntarily paying plaintiff the weekly charge therein established for each week up to and including the week ending May 17, 1930; that plaintiff fully and faithfully performed all the terms of each of said contracts.

EIGHTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Fourth Affirmative Defense, contained in his said Amended Answer, plaintiff alleges:

I.

That that certain agreement, bearing date of September 4, 1929, a substantial copy whereof is pleaded in said Answer and designated as Exhibit 4, was duly signed and executed by the defendant in person in Seattle, Washington, on or about December 30, 1929, and was duly signed and executed by the authorized officer and agent of plaintiff in New York City on or about September 4, 1929, and was executed by said parties for the purpose of modifying that certain agreement theretofore mutually made by them under date of March 28, 1929, a substantial copy whereof, marked Exhibit B, is attached to defendant's said Amended Answer, wherein, by agreement between said parties, the amount of the weekly charge that plaintiff should make and that defendant should pay plaintiff for periodical services to be rendered by plaintiff was not inserted but was left to be later established by mutual agreement of the parties hereto.

NINTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Sixth Affirmative Defense contained in his said Amended Answer, plaintiff alleges:

I.

That that certain contract, made by the parties herein on March 28, 1929, a substantial copy whereof, marked Exhibit B, is attached to defendant's Amended Answer, as modified by that certain

contract bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 4, is pleaded in defendant's said Amended Answer, is separable and divisible in that the provisions [71] thereof, relative to the periodical inspection and minor adjustment services to be rendered thereunder by plaintiff to defendant and for which defendant agreed to pay plaintiff the sum of \$29.75 per week, are entirely distinguishable from and not dependent upon the provisions of said contract as so modified with respect to the repair parts therein mentioned to be furnished by plaintiff to defendant at his request, and that said services were for labor only and were furnished and to be paid for irrespective of whether or not plaintiff furnished to defendant or defendant obtained from plaintiff any repair parts for the moving picture equipment that plaintiff furnished to defendant under said contract.

TENTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Third Counterclaim, contained in his said Amended Answer, plaintiff alleges:

I.

That plaintiff did not replevin or cause to be replevined any of the equipment mentioned in defendant's First Counterclaim nor did plaintiff take or cause to be taken any of said equipment from the possession of defendant, nor did plaintiff deprive defendant of the use of said equipment, nor did

plaintiff transport any of said equipment to any point without the Territory of Alaska until after the commencement of this suit; that none of said acts were in existence or had been done at the time of the commencement of this suit.

ELEVENTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Third Counterclaim, contained in his said Amended Answer, plaintiff alleges:

I.

That prior to the institution of the aforesaid suit, numbered and entitled on the records and dockets of this court as No. 3167-A, Electrical Research Products, Inc., a corporation, Plaintiff, vs. W. D. Gross, Defendant, defendant, in violation of [72] the terms of that certain contract of March 28, 1929, a substantial copy whereof is attached to defendant's said Amended Answer, marked Exhibit B, as modified by that certain contract bearing date September 4, 1929, a substantial copy whereof, marked Exhibit 4, is set forth in defendant's said Amended Answer, both of which contracts were mutually entered into by and between the parties hereto, had obtained and placed in his Coliseum Theatre, in Ketchikan, Alaska, certain talking moving picture equipment, and had removed from said theatre and no longer used therein the equipment so theretofore installed therein by plaintiff in pursuance to the aforesaid contracts with defendant, all of which acts

were done by defendant prior to the institution of said action and prior to the issuance of and to the services of any writ of replevin herein.

TWELFTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Fourth, Fifth and Sixth Affirmative Defenses and the Third and Fourth Counterclaims, contained in his said Amended Answer, plaintiff alleges:

I.

That on or about March 28, 1929, the parties hereto made and entered into that certain agreement bearing that date, a substantial copy of which, marked Exhibit B, is attached to said Amended Answer; that at the time of the execution of said contract said parties mutually agreed that the weekly charge for the services to be rendered thereunder by plaintiff for periodical inspections had not been established and that the amount thereof should be later determined and mutually agreed upon by the parties hereto; that thereafter and under date of September 4, 1929, in pursuance to said agreement and for the purpose of modifying thereby said previous agreement of March 28, 1929, and to establish the weekly charge that plaintiff should make and which defendant should pay plaintiff for the periodical services to be rendered by plaintiff under the aforesaid contract of March 28, 1929; the parties hereto mutually made and entered

into that certain agreement, a substantial copy whereof, marked Exhibit 4, is set forth in [73] defendant's said Amended Answer; that said last mentioned agreement was actually executed by defendant in person on or about December 30, 1929.

II.

That plaintiff, in reliance upon said agreement of March 28, 1929, as so modified by said agreement bearing date September 4, 1929, rendered and performed, at its own cost, periodical inspection and minor adjustment services to defendant in respect to his Coliseum Theatre in Ketchikan, Alaska, at all times from and after the installation by defendant in said theatre of that certain moving picture equipment furnished to defendant by plaintiff under said agreement of March 28, 1929, not only up and until December 20, 1929, on which date defendant executed said supplemental agreement of September 4, 1929, but also thereafter from said December 30, 1929, up and until March 7, 1931, and also offered and was willing so to do, but was prevented by defendant therefrom, thereafter and up to April 20, 1931; that plaintiff fully and faithfully performed all the terms of each of said contracts.

III.

That defendant at all of said times knew that plaintiff was rendering and performing said services in reliance upon defendant's performance of the terms of the aforesaid contracts, and defendant, so

knowing, accepted said services and permitted them to be rendered and performed to him by plaintiff; that by his said acceptance of said services in pursuance to said agreements, defendant is estopped from now claiming that either of said agreements were null and void in respect to the services so rendered to defendant by plaintiff thereunder and for none of which services, so rendered and performed subsequent to May 17, 1930, has defendant ever paid plaintiff anything whatsoever.

THIRTEENTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's First Counterclaim contained in his said Amended Answer, plaintiff alleges: [74]

I.

That there is another action pending for the same cause between these same parties, namely: Defendant seeks to recover and counterclaim from plaintiff upon the same cause the same sums, as contained in his said First Counterclaim herein, as in that certain pleading denominated by him "First Counterclaim" in that certain suit entitled and numbered upon the records and dockets of this Honorable Court, No. 3158-A, Electrical Research Products, Inc., a corporation, Plaintiff, vs. W. D. Gross, Defendant, which last named suit, including said counterclaim therein, is now pending in this court between these same parties.

FOURTEENTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Second Counterclaim contained in his said Amended Answer, plaintiff alleges:

I.

That there is another action pending for the same cause between these same parties, namely: Defendant seeks to recover and counterclaim from plaintiff upon the same cause the same sums, as contained in his said Second Counterclaim herein, as in that certain pleading denominated by him "Second Counterclaim" in that certain suit entitled and numbered upon the records and dockets of this Honorable Court, No. 3158-A, *Electrical Research Products, Inc., a corporation, Plaintiff, vs. W. D. Gross, Defendant*, which last named suit, including said counterclaim therein, is now pending in this court between these same parties.

FIFTEENTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Third Counterclaim contained in his said Amended Answer, plaintiff alleges:

I.

That there is another action pending for the same cause between these same parties, namely: Defendant seeks to recover and counterclaim from plaintiff upon the same cause the same sums, as contained in his said Third Counterclaim herein, as in that certain pleading denominated by his "Third Counter-

claim" in that [75] certain suit entitled and numbered upon the records and dockets of this Honorable Court, No. 3158-A; Electrical Research Products, Inc., a corporation, Plaintiff, vs. W. D. Gross, Defendant, which last named suit, including said counterclaim therein, is now pending in this court between these same parties.

SIXTEENTH AFFIRMATIVE REPLY

And, as a further and separate Affirmative Reply to defendant's Fourth Counterclaim contained in his said Amended Answer, plaintiff alleges:

I.

That this is another action pending for the same cause between these same parties, namely: Defendant seeks to *recover plaintiff* upon the same cause the same sums, as contained in his said Fourth Counterclaim herein, as in that certain pleading denominated by his "Fourth Counterclaim" in that certain suit entitled and numbered upon the records and dockets of this Honorable Court, No. 3158-A, Electrical Research Products, Inc., a corporation, plaintiff, vs. W. D. Gross, Defendant, which last named suit, including said counterclaim therein, is now pending in this court between these same parties.

WHEREFORE, Plaintiff renews its prayer as in its Amended Complaint herein contained, and further prays that defendant may take nothing by his

Amended Answer herein or by his several Counter-claims therein contained.

Respectfully,

HENRY RODEN

R. E. ROBERTSON

Attorneys for Plaintiff. [76]

United States of America,
Territory of Alaska.—ss.

H. M. WILCOX, being first duly sworn on oath, deposes and says: That he is vice president of the corporate plaintiff; that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

H. M. WILCOX

Subscribed and sworn before me this 19th day of January, 1935.

[Seal]

R. E. ROBERTSON

Notary Public for Alaska.

My commission expires June 24, 1937.

[Endorsed]: Copy received January 19, 1935.

J. A. HELLENTHAL

Attorney for Defendant.

[Endorsed] Filed January 21, 1935. [77]

[Title of Court and Cause.]

VERDICT.

We, the Jury, empaneled and sworn in the above entitled cause, find for the defendant generally and

against the plaintiff upon the issues presented by the First Cause of Action stated in the Complaint.

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff, upon the issues presented by the Second Cause of Action stated in the Complaint.

We, the Jury, empaneled in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the First Counter-Claim pleaded in the Answer against the First Cause of Action set up in the plaintiff's Complaint; and in this connection we assess the defendant's damages as follows:

- (1) The rental value of the equipment taken from the "Coliseum" theatre at Juneau, under a writ of replevin in this action: \$ 9000.00

 - (2) Damages resulting from the loss of profits to the defendant by reason of the removal of the equipment from the "Coliseum" theatre at Juneau: \$19440.00
- [78]
- (3) Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Juneau: \$ 2628.92

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant gen-

erally and against the plaintiff upon the issues presented by the Second-Counter Claim to the First Cause of Action and fix the amount of the recovery on said Counter-Claim at \$1725.77.

We, the Jury, empaneled and sworn in the above entitled cause further find for the defendant generally and against the plaintiff upon the issues presented by the Third-Counter Claim, the same being the First Counter-Claim to the Second Cause of Action, and assess the defendant's damages as follows:

- (1) The rental value of the equipment taken from the "Coliseum" theatre at Ketchikan, under a writ of replevin in this action: \$ 9000.00
- (2) Damages resulting from the loss of profits to the defendant by reason of the removal of the equipment from the "Coliseum" theatre at Ketchikan: \$12320.00
- (3) Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Ketchikan: \$ 2628.92

We, the Jury, further find for the defendant generally and against the plaintiff upon the issues presented by the Fourth [79] Counter-Claim, the same being the Second Counter-Claim to the Second-

Cause of Action, and fix the amount of recovery on the said Counter-Claim at \$1692.72.

JOSEPH SIMPSON,

Foreman.

[Endorsed]: Filed Feb. 14, 1935.

[Endorsed]: Entered Court Journal No. 9, page 330. [80]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the plaintiff and respectfully moves that it be granted a new trial herein upon the following grounds, to-wit:

1. Irregularity in the proceedings of the court and abuse of discretion whereby plaintiff was prevented from having a fair trial and particularly in the making of that certain order of the court whereby, over plaintiff's objection, the defendant although having made and filed his answer to plaintiff's amended complaint herein on August 31, 1931, was granted permission to file more than two and one-half years thereafter his amended answer herein on March 28, 1934, which amended answer was substantially in form the same as defendant's said previous answer other than in said amended answer defendant by his third and sixth affirmative defenses alleged that the contracts of September 4, 1929, as well as the contracts of March 28, 1929, which latter contracts were alleged to be valid contracts by defendant in his first and fourth defenses

and in his first and third counterclaims, both in said original and said amended answer, were null and void under the Clayton and Sherman Anti-Trust Acts, but which third and sixth affirmative defenses were stricken at the trial of this cause, and the effect of the filing of which amended answer was to deprive plaintiff of the benefit of the provisions of Section 896, Compiled Laws of Alaska 1913, which was in effect not only when this cause was commenced but also at the time of the filing of plaintiff's said amended complaint herein and of defendant's said original answer herein and continued in effect up and until ninety days after [81] April 1, 1933, on which last named date it was amended by Chapter 6, Alaska Session Laws 1933 (Sec. 3422 Compiled Laws of Alaska, 1933) and particularly in the making of that certain order of the court whereby, over plaintiff's objection, the defendant was permitted to amend his said amended answer in accordance with his motion filed herein on January 3, 1935, and particularly in the making of that certain order of the court whereby, over plaintiff's objection, it set this cause for trial and required plaintiff to go to trial with this cause prior to the trial of that certain cause between the parties hereto which is now pending upon the dockets and records of this court, namely No. 3158-A, Electrical Research Products, Inc., a corporation, plaintiff, vs. W. D. Gross, defendant, which last named cause was commenced on March 7, 1931, and was at issue at the time that the court made its said order herein

complained of and which cause, under the rules and customary practice of this court, plaintiff was entitled to have tried prior to the trial of this cause which was not commenced until April 20, 1931, and also the irregularity in the proceedings of the court and the adverse party as set forth in paragraph 2 hereof.

2. Accident and surprise, against which by the exercise of ordinary prudence plaintiff could not be guarded, occurring at the trial of this cause, namely: plaintiff in rebuttal offered in evidence copies of the income tax returns of defendant, furnished for inspection to plaintiff by defendant after the trial herein had commenced, and the reception whereof in evidence was thereupon objected to by the defendant through his counsel, in open court and in the presence of the jury, upon the ground among others that the defendant's witness Charles Tuckett had been released by defendant from attendance of the trial and had departed from the Territory of Alaska two or three days previously and that therefore, since defendant prior to said witness' departure had stated in open court that said witness was going to depart, it was unfair [82] for plaintiff to put in evidence, after his departure, said copies of said income tax returns; that said copies of said income tax returns thereupon were refused admittance in evidence by the court notwithstanding that plaintiff was under no duty to keep said defendant's witness in attendance and which witness plaintiff then had no way of bringing back within the jurisdiction of this court.

3. Excessive damages, appearing to have been given under the influence of passion and prejudice in that the damages allowed defendant constitute double damages and give the defendant damages for refunds of rentals of the equipments for the period from April 20, 1931, to May 1, 1933, for the Juneau theatre and for the period from April 28, 1931, to May 1, 1933, for the Ketchikan theatre, notwithstanding the jury gave the defendant damages for the same respective periods in the way of alleged lost profits without in any wise deducting therefrom the rental value of the sound reproducing equipment in said theatres for said respective periods, and furthermore in that the damages allowed for alleged rental value failed to take into consideration that defendant had in his possession the equipments in his said two theatres for approximately two years each, namely Juneau from May 11, 1929, to April 20, 1931, and in his Ketchikan theatre from June 1, 1929, to April 28, 1931; and also allowed defendant damages for alleged cost of substituted or replacing equipments, notwithstanding the allowance of damages for alleged lost profits as aforesaid; and also allowed the defendant damages as alleged lost profits of both his Juneau and Ketchikan theatres notwithstanding that no evidence definitely and certainly establishing the alleged amount, if any, of lost profits at either of said theatres was received at the trial, and further no evidence was received herein from which could be computed the respective amounts of damages as allowed in said verdict as

lost profits for the Juneau and Ketchikan theatres and that such damages necessarily must have been based upon either a compromise or an average unjustifiably used by the jury or else by some method such as [83] taking interest on some unknown sum for some unknown period and plaintiff alleges that they were computed upon the basis of either eight or ten per cent upon the respective amounts claimed by defendant at the trial as being the appraised values respectively of his Ketchikan and Juneau theatres; and said damages were computed in utter disregard of the effect upon the receipts in defendant's said theatres not only of the general financial depression prevailing in Ketchikan and Juneau, Alaska, during all of the period in question but also of the competing moving picture theatres, Capitol in Juneau, and Revilla in Ketchikan, and that each of the items of damages allowed in said verdict includes interest upon unliquidated claims and that there is no means of segregating what part of each of said item of damages is principal and what part is interest; and that none of which damages could have been arrived at under the evidence except through the influence of passion and prejudice.

4. Insufficiency of evidence to justify the verdict in any respects and that it is against the law particularly in that neither the first nor fourth affirmative defenses properly or sufficiently pleaded either want of consideration or duress in the execution of, or non-execution of, the contracts of September 4,

1929, and further that duress in the execution of the contracts of September 4, 1929, was neither sufficiently pleaded nor proved herein to constitute either a defense or a counterclaim, and in that neither the first, second, third, nor fourth counterclaims, upon which the damages contained in the verdict were assessed, could properly be pleaded as against or constituted valid counterclaims to plaintiff's amended complaint herein, and that no evidence was offered or received definitely and certainly establishing the alleged lost profits by defendant at either his Juneau or Ketchikan theatres.

5. Errors in law occurring at the trial and excepted to by the plaintiff and particularly the reception of evidence offered by [84] defendant over plaintiff's objection and the denial over plaintiff's objection of evidence offered by it, all of which more particularly appears in the record of the proceedings of said trial made by the official court reporter, and all of which will appear in the transcript of such record, and all of which by reference thereto is hereby made a part hereof, and also in the denial of plaintiff's motions made during the trial and to which rulings the plaintiff then and there excepted, and in the failure to give plaintiff's requested instructions Nos. 2, 3, 6, 7, 9, 10, 11, 12, 13, 16, 17, 18, 19, 22, and also in giving, over plaintiff's objection of the court's instructions Nos. 2, 3, 4, 5, 7, 8, 9, 10, 11, and in submitting to the jury the form of verdict prepared by defendant which form was used

by the jury in returning their verdict herein; and to all of which plaintiff excepted at the trial.

WHEREFORE, Plaintiff moves and prays that it may be granted a new trial herein.

Respectfully submitted,

HENRY RODEN,

R. E. ROBERTSON,

Attorneys for Plaintiff.

Copy received February 16, 1935,

J. A. HELLENTHAL,

Attorneys for Defendant. [85]

[Title of Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-
STANDING THE VERDICT.

Comes now the plaintiff and, notwithstanding the verdict herein, respectfully moves:

(1) That judgment be entered herein in favor of the plaintiff and against the defendant on the first cause of action contained in plaintiff's amended complaint herein and to the effect that plaintiff was entitled, at the time of the commencement of this cause, to the possession of the personal property mentioned in its said first cause of action; and

(2) That judgment be entered herein in favor of the plaintiff and against the defendant on the second cause of action contained in plaintiff's

amended complaint herein and to the effect that plaintiff was entitled, at the time of the commencement of this cause, to the possession of the personal property mentioned in its said second cause of action.

Respectfully submitted,

HENRY RODEN,

R. E. ROBERTSON,

Attorneys for Plaintiff.

Copy received February 16, 1935.

J. A. HELLENTHAL,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 16, 1935. [86]

[Title of Court and Cause.]

MINUTE ORDER.

Now at this time this matter comes before the court upon motion for judgment notwithstanding the verdict, also a motion for a new trial. R. E. Robertson appears in behalf of plaintiff and J. A. Helleenthal and H. L. Faulkner in behalf of defendant. Whereupon the court being fully advised by arguments submitted by counsel, overruled both motions. Whereupon the plaintiffs take an exception to the ruling on both motions which the court allows.

The above minute order is as entered on page 344 of the Civil and Criminal Journal Number 9 of the above-entitled Court. [87]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 3167-A

ELECTRICAL RESEARCH PRODUCTS, Inc.,
a corporation,

Plaintiff,

vs.

W. D. GROSS,

Defendant.

JUDGMENT.

This matter came on regularly for trial on the 21st day of January, 1935, and all parties being present in Court and represented by counsel, a jury was regularly empaneled and sworn to try the issues. Evidence was adduced by both parties; and after all the evidence had been presented and submitted, and after the arguments of counsel had been had, and the Court's instructions had been given, the Jury retired to deliberate of their verdict. And the Jury after due deliberation returned into the Court the following verdict:

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 3167-A

ELECTRICAL RESEARCH PRODUCTS, Inc.,
a corporation,

Plaintiff,

vs.

W. D. GROSS,

Defendant.

VERDICT.

We, the Jury, empaneled and sworn in the above entitled cause, find for the defendant generally and against the plaintiff upon the issues presented by the First Cause of Action stated in the Complaint.

We, the jury, empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff, upon the issues presented by the Second Cause of Action stated in the Complaint.

We, the Jury, empaneled in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the First Counter-Claim pleaded in the Answer against the First Cause of Action set up in the plaintiff's Complaint; and in this connection we assess the defendant's damages as follows: [88]

- (1) The rental value of the equipment taken from the "Coliseum" theatre at Juneau, under a writ of replevin in this action: \$ 9,000.00
- (2) Damages resulting from the loss of profits to the defendant by reason of the removal of the equipment from the "Coliseum" theatre at Juneau: 19,440.00
- (3) Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Juneau: 2,628.92

We, the Jury empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the Second Counter-Claim to the First Cause of Action, and fix the amount of the recovery on said Counter-Claim at \$1,725.77.

We, the Jury empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the Third Counter-Claim, the same being the First Counter-Claim to the Second Cause of Action, and assess the defendant's damages as follows:

- (1) The rental value of the requirement taken from the "Coliseum" theatre at Ketchikan, under a writ of replevin in this action: \$ 9,000.00
- [89]
- (2) Damages resulting from the loss of profits to the defendant by reason of the removal of the equipment from the "Coliseum" theatre at Ketchikan: \$12,320.00
- (3) Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Ketchikan: 2,628.92

We, the Jury, further find for the defendant generally and against the plaintiff upon the issues presented by the Fourth Counter-Claim, the same being the Second Counter-Claim to the Second Cause of Action, and fix the amount of recovery on the said Counter-Claim at \$1,692.72.

JOSEPH SIMPSON

(Foreman)

Thereafter, a motion for judgment non obstante veredicto was duly and regularly filed and regularly denied by the Court; a motion for a new trial was also regularly filed and duly and regularly denied by the Court.

And evidence relating to the question of what is a reasonable attorney fee to be allowed the defendant having been presented to the Court, and the Court

having found that \$7500.00, is a reasonable attorney fee to be allowed the defendant in connection with the trial and presentation of this cause, and having fixed that amount as a reasonable attorney fee to be recovered by the defendant herein; and the Court being fully advised in the premises;

IT IS CONSIDERED, ORDERED, AND ADJUDGED, that the complaint of the plaintiff be dismissed; that it take nothing by reason thereof; that the plaintiff recover nothing by reason of its First Cause of Action stated in the complaint; and that it recover nothing by reason of its Second Cause of Action stated in the complaint; that the defendant have and recover of and [90] from the plaintiff and he is hereby given judgment against the plaintiff for the full sum of Fifty Eight Thousand Four Hundred Thirty Six Dollars and Thirty-Three Cents, (\$58,436.33), the same being the total sum due the defendant from the plaintiff by reason of the four (4) Counter-Claims referred to in the Verdict above set forth; and that the defendant also have judgment against the plaintiff for \$7500.00 as a reasonable attorney fee herein; and that the defendant further have judgment against the plaintiff and recover from it interest at eight (8%) per cent from the date hereof on all monies due him under this judgment, together with his costs and disbursements herein, to be taxed at \$.....; and that the plaintiff have an exception to the allowance of any attorney fees herein and to rendition of this judgment.

DONE in open Court this 16th day of March, 1935.

GEO. F. ALEXANDER

Judge.

[Endorsed]: Filed Mar. 19, 1935.

[Endorsed]: Entered Court Journal No. 9, page 375. [91]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the plaintiff, Electrical Research Products, Inc., a corporation, by its attorneys, and respectfully assigns, in connection with its petition for appeal herein, the following errors committed in the proceedings and in the trial of the above entitled cause, which it intends to urge upon the hearing of the appeal herein and upon which it relies to reverse the judgment entered herein on March 16, 1935. in favor of the defendant and against the plaintiff for \$58,436.33 and for the further sum of \$7,500.00 as attorney fees and for costs and interest.

1.

The Court erred in instructing the jury as follows (Court's instruction No. 7, Paragraph 2, commencing line 15, page 23):

“And in this connection, I instruct you that the said agreements (of March 28, 1929) or

either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment services.”

to which instruction, plaintiff excepted as follows:

“Take exception to instruction number 7, particularly that part of it commencing at line 15, page 23, as not being a true statement as to the effect of the contracts exhibits “1” and “3” of March 28th, 1929, and is not a statement in accord with either the law governing the contracts of March 28, 1929, or the facts produced in evidence as shown by the contract itself. We take the position there that throughout the case the omission of the amount in paragraph 6 does not make the service free.”

2.

The Court erred in instructing the jury as follows (Court’s instruction No. 2, paragraph 8, commencing line 20, page 13): [92]

“And in this connection, I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts (of September 4, 1929) the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services.”

to which instruction, plaintiff excepted as follows:

“We take an exception to instruction No. 2
* * *. We take an exception to that part of the

Court's instructions commencing with line 20 on page 13 (Par. 8) * * *."

3.

The Court erred in refusing to give plaintiff's requested instruction No. 2, as follows:

"You are instructed that the plaintiff claims that the amount to be paid for inspection and minor adjustment services was left in blank in paragraph six of each of the contracts of March 28th, 1929, plaintiff's exhibits Nos. 1 and 3, because the amount thereof could not be determined at the time that those two contracts were made and that it was understood between plaintiff and defendant that the amount of that weekly charge should be fixed at a later date.

"In this connection I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties. The plaintiff alleges that the amount to be paid for such services was agreed upon between it and the defendant and that it was to be \$29.75 per week for each theatre and plaintiff further alleges that this agreement was expressed in the supplemental contracts of Sep-

tember 4th, 1929, plaintiff's exhibits Nos. 2 and 4."

to which refusal plaintiff duly excepted.

4.

The Court erred in instructing the jury as follows (Court's instruction No. 3, paragraph 4, commencing line 21, page 15) :

"In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is authorized to alter or modify those agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to [93] time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that 'Anderson' had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the par-

ties afterwards voluntarily ratified these agreements.”

to which instruction, plaintiff excepted as follows:

“We except to that part of the court’s instruction No. 3, commencing on line 21, page 15 down to the remainder of that particular instruction 3, on the ground it does not state the true principle of law applicable to written instruments or contracts particularly, and that neither party is bound by the particular provision that only a president or vice-president could change these contracts if they afterwards agree to change them otherwise.”

5.

The Court erred in refusing to give plaintiff’s requested instruction No. 3, as follows:

“The defendant claims that under the original contracts of March 28th, 1929, plaintiff’s exhibits Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in any way unless such alteration or modification shall be approved by the president or a vice president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.

“You are instructed that the plaintiff has submitted evidence tending to show that R. E. Anderson did have authority from the plaintiff

corporation to execute the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff corporation through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modifying them, have been complied with."

to which refusal plaintiff duly excepted.

6.

The Court erred in overruling the plaintiff's demurrer to the second and fourth counterclaims for failure to state facts sufficient to constitute a counterclaim to the amended complaint herein.

7.

The Court erred in denying plaintiff's motion to strike [94] out section D of paragraph 3 of the First and Fourth affirmative defenses in Defendant's Amended Answer, as Amended, upon the ground that the allegations of said section were irrelevant, incompetent and immaterial, to which ruling plaintiff duly excepted.

8.

The court erred in refusing to give plaintiff's requested instruction No. 13, as follows:

"You are instructed that under Section 8 of each of the contracts of March 28, 1929, plain-

tiff's exhibits Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts, furnished or supplied by plaintiff, upon delivery thereof and to pay the transportation charges thereon.

"You are instructed that the evidence in this case shows that the plaintiff pursuant to that section of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$61.92, and that no evidence has been offered by defendant tending to show that those amounts were paid by him to plaintiff at the time of the commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action."

to which refusal plaintiff duly excepted.

9.

The Court erred in instructing the jury as follows (Court's instructions Nos. 8 and 10, paragraphs 2, 3, 7 and 9, which instructions were identical except No. 8 referred to the Juneau Theatre and first counterclaim and No. 10 to the Ketchikan Theatre and third counterclaim):

“* * * in this connection I instruct you that it is admitted by the plaintiff that the rental value of the equipment so taken out is \$1,050.00 per year (for each theatre) and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than \$8,458.30 (for each theatre), together with 8% interest thereon from and after the date that such equipment was removed; and [95] that the amount to be allowed by you on this item cannot be more than \$9,627.03 (for each theatre). (Paragraph 2, pages 24, 25)

* * * * *

“I further instruct you that if you find that the defendant is entitled to recover on his first (and third) Counter Claims (s) to the first (and second) Cause(s) of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau (and Ketchikan) Coliseum theatre(s) because of the removal of said equipment; (Paragraph 3, page 25)

* * * * *

“I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the first (and third) counterclaims to the first (and second) Cause(s) of action cannot be more than \$44,000.00 (under each counterclaim); that being the amount fixed by the pleadings of the defendant. (Paragraph 7, page 26)

* * * * *

“He (defendant) claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum theatre(s) at Juneau (and Ketchikan) under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are held to be recoverable; and he is entitled to recover such monies even though the installation of such new machinery or equipment did not result in reducing such damages; provided, that the defendant acted in good faith and for the purposes above stated.” (Paragraph 9, page 27)

to which instructions, the plaintiff excepted as follows:

“Also take exception to instruction number 8, your Honor, particularly upon the ground we claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event, and furthermore, that the defendant can not recover in this action upon his counterclaims in any event, and further, that portion concerning the purchase of new equipment, found on page 27, (last Par.) of that particular instruction, which we contend is not an element of damages in this case. * * * The same exception to instruction 10 as we took to instruction No. 8.”

10.

The Court erred in refusing to give plaintiff's requested instruction No. 18B, as follows:

“You are instructed that you cannot consider, in ascertaining the amount of such net useable value, any good will or alleged loss thereof because I have here- [96] tofore stricken from this case all matters dealing with the question of good will and loss thereof, and, further, you cannot consider any alleged loss of profits in arriving at the amount of the net useable value of said equipments during said periods because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres.”

to which refusal plaintiff duly excepted.

11.

The Court erred in refusing to give plaintiff's requested instruction No. 22, as follows:

“You are further instructed that you cannot allow defendant any damages on account of the purchase or cost of installation of new equipments in either of his said theatres because that is not an element of the true measure of damages in this case.”

to which refusal plaintiff duly excepted.

12.

The Court erred in admitting in evidence, over the objection and exception of the plaintiff, certain testimony of defendant, W. D. Gross, the full substance of which is as follows:

“Q. What did you do in the way of trying to remedy the sound and make it better?”

A. Tried some other equipment; we borrowed some better equipment—after—and couldn't do it any good.

Q. What effect did that have on your business?

Mr. ROBERTSON: Objection as incompetent, irrelevant and immaterial.

The COURT: Overruled. I think the question is competent; he may answer.

Mr. ROBERTSON: Exception.

Q. Now, Mr. Gross, what effect, if any, did the fact that you had inferior equipment in

your theatre have upon the business of the theatre?

Mr. ROBERTSON: May I ask that my objection be considered as going to all this line of testimony?

The COURT: Very well.

A. Lost business. It began to go down, lost business. [97]

* * * * *

Q. What was the effect upon the profits that you realized from your theatre?

A. I considered from about two to three thousand dollars a month in Juneau and the same in Ketchikan.

Q. You lost that much?

A. Yes.

* * * * *

Q. How much did you lose in profits by reason of the removal of that equipment at Ketchikan, roughly speaking?

A. From two to three thousand dollars a month in each of them."

13.

The court erred in refusing to receive in evidence plaintiff's exhibits for identifications Nos. 43, 44 and 53, the substance of which is as follows:

Plaintiff's Exhibit 43 for identification is upon printed "Form 1040—Treasury Department—Internal Revenue Service" and is headed: "Individual Income Tax Return—For net incomes from salaries or wages of more than \$5,000 and incomes from busi-

ness, profession, rents, or sale of property for calendar year 1929, W. D. Gross, Juneau, Alaska, Occupation Motion Picture.”

“See Statement Attached Hereto”

INCOME

Receipts—	At Juneau	At Ketchikan
Total Theatre Receipts for year	\$ 52,478.55	\$ 58,222.74
Total Rent from Apts & Stores	6,852.85	630.00
Total Gross Income	\$ 59,331.40	\$ 58,582.74
Total Rent from Seattle, Property		\$8500.00
Grand total of all income		\$126,414.14
Forwarded,		

[98]

Expenses—	Deductions	At Juneau	At Ketchikan
Wages, Paid		\$ 12,382.56	\$ 8,152.00
Films, cost		11,912.27	33,981.76
Freight, Paid		1,052.62	482.40
Lights, Elec., Etc.		3,716.02	1,425.19
Fuel & Fuel Oil		1,100.27	376.68
Advertising Newspapers Etc.		1,053.85	1,113.69
Repairs and replacements		1,742.83	5,096.10
Premiums on Fire Ins. & Insurance		1,759.81	712.50
Taxes, Municipal, Terr. & Federal		7,729.30	742.05
Interest on Borrowed Money		3,215.80	
Traveling Expenses		2,071.93	25.00
Gen'l Expense, all others		3,723.89	25.00
Loss, Bad Accounts		980.56	
Charity		104.00	15.00
Total Expense		\$ 52,545.71	\$ 52,120.37
Net Operating Profit at Juneau		6,785.69	
Net Operating Profit at Ketchikan			6,462.37
Net Income from Seattle, Property			8500.00
Total Net Operating Profit at Juneau, Ketchikan and Seattle			\$ 21,748.06

Depreciation at Juneau	Acquired	Cost	Previous Years	Depreciation Charged Off	This Year
Gross Apts.	1929	\$15,000.00		5%	\$ 750.00
Wooden Bldg.	1921	40,000.00	\$12,000.00	5%	2,000.00
Furn. and Fix.	1926	30,000.00	9,000.00	10%	3,000.00
Machinery	1921	5,000.00	3,000.00	10%	500.00
Totals		\$90,000.00	\$24,000.00		\$6,250.00
<u>At Seattle</u>					
Building and Lot	1928	\$125,000.00	—	2½%	\$3,125.00
<u>At Ketchikan</u>					
Wooden Bldg.	1922	60,000.00	15,000.00	5%	3,000.00
Furn. and Fix.	1922	30,000.00	15,000.00	10%	3,000.00
Machinery	1922	5,000.00	2,500.00	10%	500.00
Totals		95,000.00	32,500.00		6,500.00

Recapitulation:

Net profit at Juneau	\$ 6,785.69
Net profit at Ketchikan	6,462.37
Net rents Seattle, property	8,500.00

Total	\$21,748.06
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Depreciation

At Juneau	\$ 6,250.00
At Ketchikan	6,500.00
At Seattle	3,125.00

Total	\$ 15,875.00
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15,875.00

Net profit over and above expenses

and repairs and depreciation: 5,873.06

There are no other receipts, income, expenses, repairs and depreciation other than shown hereinabove.

[99]

"Earned Income Credit

"21. Earned Income (not over \$30,000) \$ 5,873.06

"22. Less Personal Exemption and
Credit for Dependents 3,900.00

"23. Balance (Item 21 minus 22) \$ 1,973.06

"27. Normal Tax (1½% of Item 24) \$ 9.87"

Attached to the foregoing copy of Defendant's Income Tax Return and produced by him with it are the following papers, viz.:

Letter from Internal Revenue Service to Gross dated Feb. 3, 1932, re procedure for taking appeal;

Printed form of letter from David Burnet, Commissioner of Internal Revenue to Gross, dated Feb. 3, 1932, advising that the determination of defendant's tax liability for 1929 disclosed a deficiency of \$855.61 "as shown in the attached statement";

Typewritten statement headed "In re: Mr. W. D. Gross, Juneau, Alaska. Tax Liability. Year 1929. Tax Liability \$865.48. Tax Assessed \$9.87. Deficiency \$855.61."

Printed form 870, Treasury Department, (in duplicate) headed: "In re Mr. W. D. Gross, Juneau, Alaska. Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," which is unsigned.

Printed Notice re Appeals should be addressed to United States Board of Tax Appeals.

Printed Notice, Form 882, Treasury Department, re payment.

Copy of unsigned letter dated September 3, 1932, from Defendant to Collector of Internal Revenue, Tacoma, Wash., reading:

September 3, 1932.

Collector of Internal Revenue,
Tacoma, Wash.

Dear Sir:

Mr. Fear, your agent was in my office and ask for payment of tax due in 1929.

We admit this tax of 1929 and for which we are sorry that payment has been delayed because of poor business and investments in the small towns of S. E. Alaska. [100]

We owe considerable money on conditional sales contracts and the people that hold these contracts are threaten to replevin the material if the contracts were not taken care of. This forced us to take care of this indebtedness so that we could keep our doors open.

We also had contract obligation for films that was running from 40% to 50% of our proceeds, which we could not get out of at the time being, but at present we have succeeded in reducing this film rental this year.

So therefore we are giving Mr. Fear a check for \$100.00 for this month and we will try to pay this amount each month on this past due taxes. I will also try to enlarge these payments as soon as I am able to pay off what indebtedness is now outstanding and the conditional sales contract payments have been taken care of for which they are now forcing me to keep up.

Hoping that this meets with your approval and thanking you for your past co-operation I remain,

Very truly yours,

WDG/e

Printed Notice, reading: "Notice. This is a copy of the report of the examiner of your income tax return. It is an important document and should be carefully preserved," to which is attached a printed form of letter, Form 850, dated Seattle, Wash., December 19, 1931, addressed to defendant, headed: "In re Income Tax. Date of report: Dec. 17, 1931. Recommendation: Year 1930 Additional Tax \$178.44. Total \$178.44," signed by "Geo. C. Earley, Internal Revenue Agent in Charge," to which letter are attached 5 typewritten sheets containing

detailed statements of adjustments in defendant's income tax return, followed by a printed form, reading: "Name W. D. Gross. Statement of Total Tax Liability. Year 1929: Tax previously assessed \$9.87. Adjustments proposed in accompanying report, Deficiency \$855.61. Correct Tax Liability \$865.48," followed by a letter dated Dec. 26, 1931, from defendant reading: [101]

December 26, 1931

Mr. Geo. C. Earley
Internal Revenue Agent in Charge
Seattle, Wash.

Dear Sir:

I received your income tax report written December 19, 1931, a complaint formally made out by your special agent that was in Alaska, Mr. John H. Clauson. According to Mr. Clauson's statements, however, some of the items that were in the books are not correct.

After receiving your information, I immediately started to investigate regarding your complaint.

I found that our new bookkeeper in making out the income tax reports for the years of 1929 and 1930 have not been attend to proper expenditures on our ledgers, so therefore, we ask for an extension of this claim as I am getting a capable auditor to investigate our books and revise our taxes of 1929 and 1930.

Please send me a new tax sheet for 1929 and 1930 and will be more than much oblige to you.

Thanking you for your information, also please find signed statement.

Yours sincerely

WDG.P

W. D. GROSS

followed by a letter dated January 4, 1932, to Gross from "Geo. C. Earley, Internal Revenue Agent in Charge," acknowledging receipt of defendant's letter of December 26, 1931; followed by a mimeographed form headed "Instructions as to the Preparation of Protests against findings of Revenue Agent's Reports."

Plaintiff's Exhibit 44 for Identification is upon a printed "Form 1040 Treasury Department—Internal Revenue Service" and headed: "Individual Income Tax Return for Net Incomes From Salaries or Wages of More than \$5,000 and Incomes for Business, Profession, Rents, or Sale of Property for Calendar Year 1930 W. D. Gross, Gold Belt Avenue, Juneau, Alaska. Occupation: Theatre owner and operator." [102]

"Item and Instruction No.	
" 2. Income from Business or Profession	\$ 9,768.56
	<hr/>
"12. Total income in Lines 1 to 11	\$ 9,768.56
	<hr/>
"20. Net Income (Item 12 minus item 19)	\$ 9,768.56
"Earned Income Credit	
"21. Earned Income (not over \$30,000)	\$ 5,000.00
"22. Less personal exemption and credit for dependents	\$ 3,900.00
	<hr/>
"23. Balance (item 21 minus 22)	\$ 1,100.00
	<hr/>
"24. Amount taxable at 1½%	\$ 1,100.00
	<hr/>
"27. Normal Tax (1½% of Item 24)	\$ 1,650.00
	<hr/>
"31. Tax on Earned Net Income (total of items 27 to 30)	\$ 1,650.00
	<hr/>
"32. Credit of 25% of Tax (not over 25% of Items 30, 44, 45 and 46)	\$ 4.12
	<hr/>
Computation of Tax	
"33. Net Income (item 20 above)	\$ 9,768.56
"36. Credit for Dependents	\$ 400.00
"37. Personal exemption	3,500.00
	<hr/>
"38. Total of Items 34 to 37	\$ 3,900.00
	<hr/>
"39. Balance (Item 33 minus 38)	\$ 5,868.56
"40. Amount taxable at 1½% (not over \$4,000.00)	\$ 4,000.00
	<hr/>

“41.	Balance (Item 39 minus 40)	\$	1,868.56
“44.	Normal tax (1½% of Item 40)	\$	60.00
“45.	Normal Tax (3% of Item 42)	\$	56.06
“48.	Tax on Net Income (total of items 44 to 47)	\$	116.06
“51.	Less Credit of 25% of Tax on earned income (Item 32)	\$	4.12
“52.	Total of Tax (Item 50 minus 51)	\$	111.94
“55.	Balance of Tax (Item 52 minus Items 53 and 54)	\$	111.94”

To the Printed Form 1040 is pasted the following typewritten statement, viz.:

INCOME

Receipts—	At Ketchikan	At Wrangel	At Petersburg	At Douglas	At Juneau
Total Theatre Receipts for Year	\$52775.20	\$14790.56	\$15897.35	\$ 3338.05	\$53798.14
Total Rents from Apt. & Stores	360.00				9390.00
Other Incomes Slides & Etc.	800.00				
Grand Total of All Income	\$53935.20	\$14790.56	\$15897.35	\$ 3338.05	\$63188.14

At Haines	Sitka	Alaska Film Exchange	Seattle
\$ 4752.75	\$ 6464.26 90.00	\$60,554.50	\$ 8500.00
\$ 4752.75	\$ 6554.26	\$60,554.50	\$ 8500.00
Grand Total of All Income			\$170,956.31

[103]

DEDUCTIONS

	At Ketchikan	At Wrangel	At Petersburg	At Douglas	At Juneau
Wages	\$ 7515.50	\$ 2732.50	\$ 5196.57	\$ 1272.40	\$13607.55
Alaska Film Exchange	35500.00	5500.00	6328.55	1373.65	12102.30
Film Cost					
Freight	203.77	74.34	300.25	80.60	1031.52
Light, Elec. Etc.	1085.05	427.03	531.43	82.30	2711.75
Fuel, Fuel Oil	456.71	177.01	221.72	53.00	1867.97
Advertising					
Newspaper Etc.	1236.40	150.40	542.35	84.05	1410.11
Repairs & Replacements	750.00		241.48	151.15	9410.50
Premiums on Fire Ins. & Ins.	437.50				1357.00
Taxes, Municipal Terr. & Federal	416.50	360.00	70.00	50.00	1501.12
Interest on Borrowed Money	375.65				3708.43
Traveling Exp.					1625.05
Gen'l Expense	200.00	218.36	322.42	35.75	1969.72
Rents Paid on Bldgs. & Equip.	4118.12		1650.00	245.00	2595.73
Loss, Bad Accounts					
Charity			42.00		127.00
Net Operating Profit at	\$ 1640.00	\$ 5150.92	\$ 450.48	\$ 94.75	\$ 8162.39
				Loss	

	At Haines	Sitka	Alaska Film Exchange	Seattle
Wages	\$ 1742.45	\$ 1500.00	\$ 25.00	
Alaska Film Ex.	2450.00	2800.00		
Film Cost			43094.18	
Freight	54.43	102.00	122.81	
Light, Elec. Etc.	45.00	191.71		
Fuel, Fuel Oil		131.02		
Advertising			14.60	
Newspaper Etc.				
Repairs & Replacements				
Premiums on Fire Ins. & Ins.			213.00	
Taxes, Municipal Terr. & Federal			3650.54	
Interest on Borrowed Moneys			100.00	\$ 2575.50
Traveling Exp.			182.00	
Gen'l Expense	50.84			
Rents Paid On Bldg. & Equip.			1883.91	
Loss, Bad Accts. Charity			123.00	
Net Operating Profit at	\$ 410.03	\$ 1829.53	\$11145.46	\$ 5924.50
Total Net Operating Profit in all Places				\$34,618.66

[104]

vs. W. D. Gross

DEDUCTIONS OF DEPRECIATION

Depreciation at Juneau.	Acquired	Cost	Depreciation Charged of Previous Years	This Year
Gross Apt.	1929	\$15000.00	\$ 750.00	\$ 750.00
Wooden Bldg.	1921	40000.00	14000.00	2000.00
Furniture & Fixtures	1926	30000.00	12000.00	3000.00
Machinery	1921	5000.00	3500.00	500.00
Totals		\$90000.00	\$30250.00	\$ 6250.00
At Ketchikan				
Wooden Bldg.	1924	\$60000.00	\$18000.00	\$ 3000.00
Furniture & Fixtures	1924	30000.00	18000.00	3000.00
Machinery	1924	5000.00	3000.00	500.00
Totals		\$95000.00	\$39000.00	\$6500.00
At Seattle				
Building and Lot	1928	\$125000.00	\$ 3125.00	\$ 6250.00
Totals		\$125000.00	\$ 3125.00	\$6250.00
At Douglas				
Machinery	1930	\$ 5000.00	—	\$ 500.00

DEDUCTIONS OF DEPRECIATION (contd.)

	Acquired	Cost	Depreciation Charged of Previous Years	This Year
At Petersburg				
Machinery	1930	\$ 5000.00	—	\$ 500.00
At Wrangel				
Wooden Bldg.	1930	\$20000.00	—	\$ 1000.00
Furniture and Mach. Fix.	1930	9000.00	—	900.00
Totals		<u>\$29000.00</u>		<u>\$ 1900.00</u>
At Haines				
Wooden Bldg.	1930	\$ 5000.00	—	\$ 250.00
Furniture & Mach. Fix.	1930	7000.00	—	700.00
Totals		<u>\$12000.00</u>		<u>\$ 950.00</u>
At Sitka				
Wooden Bldg. & Iron	1930	\$18000.00	—	\$ 900.00
Furniture Fix. & Equip.	1930	11000.00	—	1100.00
Totals		<u>\$29000.00</u>		<u>\$ 2000.00</u>

RECAPITULATION:

Net Profit at Ketchikan	\$ 1640.00
Net Profit at Wrangel	5150.92
Net Profit at Petersburg	450.48
Net Loss at Douglas	94.75
Net Profit at Juneau	8162.39
Net Profit at Haines	410.03
Net Profit at Sitka	1829.53
Net Profit at Alaska Film Exchange	11145.46
Net Profit at Seattle	5924.50
	<hr/>
Total	\$34618.56

DEPRECIATION:

At Juneau	\$ 6250.00	
At Ketchikan	6500.00	
At Seattle	6250.00	
At Douglas	500.00	
At Petersburg	500.00	
At Wrangel	1900.00	
At Haines	950.00	
At Sitka	2000.00	
	<hr/>	
Total	\$24850.00	24850.00

Net Profit over and above
Expenses and Repairs,
Depreciation, Etc. \$ 9768.56

There are no other receipts, income, expenses, repairs, and depreciation other than shown hereinabove.

Fastened to the foregoing copy of Defendant's Income Tax Return, and produced by him with it were the following papers, viz.:

“Notice: This is a copy of the Report of the Examiner of your Income Tax Return. It is an important document and should be carefully pre-

served," and a letter upon the stationery of the Treasury Department, Internal Revenue Service, dated 528 Republic Building, Seattle, Washington, July 8, 1932, addressed to W. D. Gross, Juneau, Alaska, headed "In re: Income tax. Date of Report: June 21, 1932. Years Examined: 1930," and stating in substance that "enclosed is a copy of the report covering examination recently made by a representative of this office concerning your income tax liability which is furnished for your information and files," and that no remittance should be made until notice of [106] assessment, and requesting acknowledgment, and signed by "Geo. C. Earley, Internal Revenue Agent in Charge," to which letter are attached 36 sheets of typewritten matter, giving a detailed statement of the Internal Revenue Bureau's adjustment of the defendant's Income Tax Return, and concluding with a printed form reading: "W. D. Gross, Statement of Total Tax Liability. Year 1930. Tax Previously assessed \$111.94. Adjustments proposed in accompanying report: Deficiency, \$2,056.09. Correct Tax Liability \$2,168.03."

Plaintiff's Exhibit 53 for identification is upon printed form of the Treasury Department, Internal Revenue Service, and is headed: "Individual Income Tax Return—For Net Incomes from Salaries or Wages of More Than \$5,000 and Incomes from Business, Profession, Rents, or Sale of Property—For Calendar Year 1932—W. D. Gross & Wife,

Juneau, Alaska—Occupation, Business, or Profession Theatre Business.”

“Item and
Instruction

No.

“ 2.	Income from Business or Profession	\$42,364.94
“18.	Other Deductions not Reported Above	36,987.91
“19.	Total Deductions in Items 13 to 18 (Depreciation)	22,440.68
“21.	Less: Net loss for 1931	17,063.65”

Upon the face of the printed form is written in typewriting “(Note Attach Statement)”. Attached to the printed form are the following typewritten statements, including the hereinafter quoted printed form of letter from “Geo. C. Earley, Internal Revenue Agent in Charge” to “W. D. Gross and Wife”, namely:

“This office is recommending to the Commissioner of Internal Revenue that your income tax returns for the year or years indicated be accepted as correct.

“I am sure you will appreciate that this action is subject to approval in Washington, and also that should subsequent information be received which would materially change the

amount reported, the Bureau is obliged under existing laws to redetermine your tax liability.”

which letter is dated Seattle, Washington, July 26, 1933, and is headed: “In re Income Tax—Years Covered: 1932.” [107]

INCOME TAX REPORT FOR THE YEAR 1932

Summary of Business Done By W. D. Gross Including Theatre Receipts, Profits, Expenses, etc. and Depreciation for the Year 1932.

B-B-B

Total Profit Before Deductions	\$42,364.94
--------------------------------	-------------

A-A-A

Film Rentals, Repairs, Replacements, Freight, Advertising paid by Alaska Film Exchange	\$36,987.91
--	-------------

Net Profit Before Deducting Depreciation	\$5,377.03
--	------------

C-C-C

Depreciation for Year 1932—	\$22,440.68
-----------------------------	-------------

Net Loss 1932—	\$17,063.65
----------------	-------------

Total Profit (loss) From All Theatres, Rents, etc. Before Deducting Film Rental, Depreciation and etc.

	<i>Profit</i>	<i>Loss</i>
A-A Douglas	\$ 1757.94	
A-B—Haines Coliseum		\$205.21
Haines Light Plant	434.20	
A-C Juneau Coliseum	5864.28	
Rentals	12063.50	
A-D—Ketchikan Coliseum	8160.74	
A-E—Petersburg Coliseum	2994.94	
Rentals	1038.91	
A-F Sitka Coliseum	4572.38	
A-G—Wrangel Coliseum	4626.29	
A-H—Seattle, Rentals	1056.97	
	<hr/>	<hr/>
Totals	\$42570.15	\$205.21
Net Total Before Deductions	\$42364.94	

A-A-A

1932—

Alaska Film Exchange
Juneau, Alaska

Total Cost of Films

 Paid for by Alaska Film Exchange \$28132.69

Total Cost of Film

 Paid for by Coliseum Theatre
 Ketchikan, Alaska 4783.33

Total Cost of Film

 Paid for by Coliseum Theatre
 Juneau, Alaska 2265.54

Repairs, Replacements, Freight

 Advertising Paid for by
 Alaska Film Exchange 1806.35

Total Film Cost Plus

 Repairs and etc. \$36987.91

C-C-C

DEPRECIATION 1932—

From All Sources

		Reserve Claimed 12/31/31	Depreciation Claimed 12/31/32	Reserve 12/31/32
A-C-1	Juneau, Alaska	3719.84	1484.92	5204.76
A-C-2		2837.69	1174.22	4011.91
A-C-3		7800.00	650.00	8450.00
A-C-4		3200.00	400.00	3600.00
A-C-5		13800.00	1150.00	14950.00
		6800.00	850.00	7650.00
A-C-6		14700.00	2100.00	16800.00
A-C-7		3900.00	1300.00	5200.00
A-C-8		2291.68	—	2291.68
A-C-9		200.00	300.00	500.00
A-C-10		50.00	200.00	250.00
A-D-1	Ketchikan, Alaska	21453.08	1726.54	23179.62
A-D-2		10060.29	1117.78	11178.07
A-D-3		12721.13	7.98	12729.11
A-D-4		5000.00	—	5000.00
A-D-5		2291.68	—	2291.68
A-D-6		200.00	300.00	500.00

A-C

COLISEUM THEATRE

Juneau, Alaska

1932		
Receipts		\$27379.46
Expenses (without films)		
Salaries, Wages	\$ 5490.82	
Advertising (Newspaper & Etc.)	1878.05	
Fuel, Oil	2509.01	
Lights (Elec.)	2090.14	
Freight	766.55	
Interest	2965.50	
Gen'l Expense	1378.70	
Repairs	2815.21	
Insurance	379.95	
Taxes (City)	794.00	
Travel	447.25	
	<hr/>	
Total Expense Without Deducting Film Rental	\$21515.18	\$21515.18
		<hr/>
Total Profit Before Film Deductions		\$ 5864.28
<hr/>		
1932		
Juneau Rents Collected**	\$12063.50	
	<hr/>	
Total Profit from Rental		\$12063.50

A-D
COLISEUM THEATRE
Ketchikan, Alaska

1932			
Receipts			\$14920.49
Expenses (without films)			
Wages, Salary		\$ 3222.00	
Freight		253.22	
Oil, Fuel		516.70	
Light (Elec.)		946.92	
Gen'l Expense		306.46	
Advertising		1198.29	
Interest		229.60	
Insurance		86.55	
Total Expense Without			
Deducting Film Rentals		\$ 6759.75	\$ 6759.75
Total Profits Before Film			
Deductions			\$ 8160.74
			[110]

A-C-
JUNEAU, ALASKA
DEPRECIATION 1932

	Value	Acquired	Rate	Reserve Claimed 12/31/31	Depre. Claimed 12/31/32	Reserve 12/31/32
A-C-1						
Gross Apt.	\$29698.35	1929	5%	\$ 3719.84	\$ 1484.92	\$ 5204.76
Land	\$2000.00					
A-C-2						
Furniture	\$ 5870.93	1929	20%	\$ 2837.69	\$ 1174.22	\$ 4011.91
A-C-3						
Grand Bldg.	\$13000.00	1920	5%	\$ 7800.00	\$ 650.00	\$ 8450.00
Land	\$5000.00					
A-C-4						
Forest Bldg.	\$ 8000.00	1924	5%	\$ 3200.00	\$ 400.00	\$ 3600.00
Land	\$6000.00					
A-C-5						
Coliseum	\$23000.00	1921	5%	\$13800.00	\$ 1150.00	\$14950.00
Land	\$5000.00					
	\$40000.00	1924	5%	\$ 6800.00	\$ 850.00	\$ 7650.00
Addition Reductions				\$17000.00		

	Value	Acquired	Rate	Reserve Claimed 12/31/31	Depre. Claimed 12/31/32	Reserve 12/31/32
A-C-6						
Furniture						
Fixtures	\$21000.00	1925	10%	\$14700.00	\$ 2100.00	\$16800.00
A-C-7						
Organ	\$13000.00	1929	10%	\$ 3900.00	\$ 1300.00	\$ 5200.00
A-C-8						
Sound						
Equipment	\$11000.00	1929	10%	\$ 2291.68	—	2291.68
Carried as Assets until Court Decides Note St. 12/31/31-A-C-8						
A-C-9						
Sound						
Equipment	\$ 3000.00	1931	10%	\$ 200.00	\$ 300.00	\$ 500.00
A-C-10						
Valanetine						
Property	\$ 4000.00	1931	5%	\$ 50.00	\$ 200.00	\$ 250.00
Land	\$4000.00					

[111]

A-D
KETCHIKAN, ALASKA
DEPRECIATION 1932

A-D-1						
Coliseum	\$34530.79	1923	5%	\$21453.08	\$ 1726.54	\$23179.62
Land	\$8000.00					
A-D-2						
Kimbal Organ	\$11178.07	1923	10%	\$10060.29	\$ 1117.78	\$11178.07
A-D-3						
Furniture &						
Fixtures	\$12729.01	1923	10%	\$12721.13	\$ 7.98	\$12729.01
A-D-4						
Machinery	\$ 5000.00	1922	10%	\$ 5000.00	\$ —	\$ 5000.00
A-D-5						
Sound Equip-						
ment W E	\$11000.00	1929	10%	\$ 2291.68	\$ —	\$ 2291.68
Note Carried as Assets Until Court Decides Statement 12/31/31 A-D-5						
A-D-6						
Sound						
Equipment	\$ 3000.00	1931	10%	\$ 200.00	\$ 300.00	\$ 500.00

* * * * *

to the refusal of which exhibits in evidence plaintiff duly excepted.

Wherefore plaintiff prays that the judgment above referred to may be reversed.

HENRY RODEN

R. E. ROBERTSON

Of Attorneys for Plaintiff

Copy of foregoing assignment of errors received this June 5, 1935.

J. A. HELLENTHAL

Of Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Jun. 12, 1935. Robert E. Coughlin, Clerk, by J. W. Leivers, Deputy. [112]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now ELECTRICAL RESEARCH PRODUCTS, INC., a corporation, the above-named plaintiff, and complains that in the records and proceedings had in this Court in this cause, and also in the rendition of the judgment herein against it on March 16, 1935, in the principal sum of \$58,436.33, and for the further sum of \$7,500.00 as attorney's fees, together with interest thereon and costs, manifest error has happened to its great damage as will more fully appear from the assignments of error filed herewith, and respectfully appeals to

the United States Circuit Court of Appeals for the Ninth Circuit for such further orders and processes as may cause the said errors to be corrected, and respectfully prays that this, its appeal, may be allowed and that a citation may issue upon said appeal and that a transcript of the record herein may be sent to the said Honorable Circuit Court of Appeals and that an order may be entered herein fixing the amount of the bond, as a cost and supersedeas bond, to be given by it and that these proceedings may be stayed pending said appeal; and your petitioner will ever pray.

HENRY RODEN,
R. E. ROBERTSON,

Attorneys for Plaintiff Petitioner.

[Endorsed]: Service of copy of the foregoing petition admitted this June 5, 1935.

J. A. HELLENTHAL,
Of Attorneys for Defendant. [113]

ORDER ALLOWING APPEAL.

The foregoing petition, on this day, coming regularly on for hearing, **IT IS HEREBY ORDERED** that said appeal be and the same is hereby allowed, and that citation may issue upon said appeal for the transcript of the records to be sent to the United States Circuit Court of Appeals for the Ninth Circuit; that the bond to be given by the plaintiff petitioner as a cost and supersedeas bond is hereby fixed

at \$75,000.00, and that, upon the giving of said bond, execution and further proceedings be stayed herein.

Done in open court this 12 day of June, 1935.

GEO. F. ALEXANDER,

District Judge.

[Endorsed]: Filed Jun. 12, 1935. [114]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, ELECTRICAL RESEARCH PRODUCTS, INC., a corporation, as principal, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, as surety, hereby acknowledge ourselves to be indebted and firmly bound to pay to W. D. Gross the sum of Seventy-five Thousand (\$75,000.00) Dollars, in good and lawful money of the United States, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of June, 1935.

The condition of this obligation is such that whereas the above bounden Electrical Research Products, Inc., a corporation, has appealed to the United States Circuit Court of Appeals for the

Ninth Circuit from that certain judgment rendered, made and entered in this cause on March 16, 1935, wherein and whereby it is ordered, adjudged and decreed that W. D. Gross, the above named defendant, have and recover from Electrical Research Products, Inc., a corporation, the above named plaintiff, the principal sum of \$58,436.33, and the further sum of \$7,500.00 as attorney's fees, together with interest and costs.

NOW, THEREFORE, if the said Electrical Research Products, Inc., a corporation, shall prosecute its said appeal to effect and shall answer for and pay all such damages and costs as may be [115] awarded against it, if it fails to make its plea good, then this obligation shall be null and void; otherwise, to remain in full force and effect.

ELECTRICAL RESEARCH

PRODUCTS, INC.,

a corporation,

By R. E. Robertson,

Its Attorney,

Principal.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

a corporation,

By R. E. Robertson,

Its Attorney-in-fact and Agent.

Surety.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 5th day of June,
1935.

M. E. MONAGLE,
Notary Public for Alaska. My commission expires
March 1, 1938.

ORDER.

Now, on this day, it is hereby ordered that the foregoing bond on appeal be and it is hereby approved as to sum and sufficiency of surety, and is further hereby ordered that said bond shall operate as a supersedeas from the filing thereof herein.

Done in open court this 12 day of June, 1935.

GEO. F. ALEXANDER,

District Judge.

[Endorsed]: Copy received June 5, 1935.

J. A. HELLENTHAL,
Of Attorneys for Defendant. [116]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Territory of Alaska—ss.

THE PRESIDENT OF THE UNITED STATES.

To W. D. Gross, the above-named defendant, and
to his attorneys, Messrs. J. A. Hellenthal and
H. L. Faulkner, GREETINGS:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-

peals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the date of this citation pursuant to an order heretofore duly made and entered herein on June 12th, 1935, by the District Court of the Territory of Alaska, Division Number One, in this cause wherein you, said W. D. Gross are defendant and appellee, and Electrical Research Products, Inc., a corporation, is plaintiff and appellant, allowing the latter's said appeal to said Honorable Circuit Court of Appeals from that certain judgment hereinafter mentioned, and then and there to show cause, if any there be, why that certain judgment heretofore entered herein in favor of said W. D. Gross and against said Electrical Research Products, Inc., a corporation, on March 16, 1935, in the principal sum of \$58,436.33, and for the further sum of \$7,500.00 as attorney's fees, together with interest and costs thereon, should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States, this 12th day of June, 1935.

[Seal]

GEO. F. ALEXANDER,

District Judge.

Attest: ROBERT E. COUGHLIN,

Clerk of the District Court.

[Endorsed]: Service of the foregoing Citation admitted this June 14, 1935.

J. A. HELLENTHAL,

Of Attorneys for Defendant.

[Endorsed]: Filed June 12, 1935. [117]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on January 19, 1935, the plaintiff made and filed herein its written motion, namely:

“That all of Section D of paragraph three of the first and fourth affirmative defenses in the amended answer, as amended, be stricken on the ground that it is sham, frivolous, incompetent, irrelevant and immaterial”,

which motion was thereafter denied by that certain order entered herein on January 19, 1935, and appearing of record, namely:

“Plaintiff’s motion against defendant’s amended answer herein, as amended, coming regularly on for hearing and the Court being fully advised in the premises, it is hereby ordered that plaintiff’s said motion be and it is hereby overruled, to which plaintiff excepts and its exception is hereby allowed.”

Thereafter, this cause came regularly on for trial on January 21, 1935, before a jury, the Honorable Geo. F. Alexander, Judge, presiding, and all parties being represented by counsel, whereupon the following proceedings were had:

Plaintiff’s witness,

R. EARLE ANDERSON,

being duly sworn, testified by deposition, read in evidence on the trial, as follows:

(Deposition of R. Earle Anderson.)

I was Comptroller of the plaintiff from April, 1927, until February, 1930, and executed, on behalf of the plaintiff, the agreements of March 28, 1929 (Plaintiff's exhibits Nos. 1 and 3) [118] and the agreements of September 4th, 1929, (Plaintiff's exhibits Nos. 2 and 4). At the time the original contract was under negotiation, the plaintiff company had a considerable number of installations of similar equipment in theatres throughout the forty-eight states of the Union, but had only one or two installations in Alaska and was unable to determine at the time whether it would have at any time more than three or four installations in Alaska. In connection with its regular standard contracts for theatre installations in the forty-eight states it had an established weekly service charge, based upon its ability to have the theatres which are the subject of these contracts visited on a regular schedule by engineers who would operate in particular territories in such manner that the cost of so servicing the theatres would be upon an economical basis. In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts, exhibits 1 and 3, of the probable cost of furnishing engineering service for the theatres in that territory.

Thereupon witness further testified, over defendant's objection: it was consequently unwilling to enter into a contract which would fix the amount of its

(Deposition of R. Earle Anderson.)

compensation for the rendering of such service when the cost of rendering it was still an unknown quantity and was willing only to enter into such contract upon the understanding that the weekly charge for servicing would be made the subject of a subsequent agreement between the plaintiff company and the exhibitor. Accordingly, when the contracts, Exhibits 1 and 3, were executed, the amount of the weekly charge for servicing the equipment was left blank and this amount was later agreed to by the parties to the contract, exhibit 1, through the medium of the subsequent agreement, exhibit 2, and to the contract, exhibit 3, through the medium of the subsequent agreement, exhibit 4.

Plaintiff's exhibits Nos. 1, 2, 3 and 4, which were received in evidence, read as follows: [119]

PLAINTIFF'S EXHIBIT No. 1.

287 T S

12 M

249700

Contract No. Alaska No. 2

THIS AGREEMENT made in triplicate in the City of New York, State of New York, this 28th day of March, 1929, by and between ELECTRICAL RESEARCH PRODUCTS, INC., (subsidiary of Western Electric Company, Incorporated), a Dela-

(Deposition of R. Earle Anderson.)

ware Corporation having its principal place of business in the City, County and State of New York (hereinafter called "Products"), licensor, and W. D. GROSS, INDIVIDUAL a Corporation having his principal place of business at No. Street, in the City of JUNEAU, State of TERRITORY OF ALASKA (hereinafter called "Exhibitor"), licensee, and operating the COLISEUM Theatre, at No. Street in the City of JUNEAU state of TERRITORY OF ALASKA (hereinafter called the "Theatre"):

WITNESSETH that, for and in consideration of the covenants, stipulations and representations herein set forth, the respective parties hereto agree as follows:

Grant of License and installation of equipment.

1. (a) Products hereby grants to the Exhibitor a non-exclusive non-assignable license to use in the Theatre (subject to all the terms, conditions, limitations, and agreements herein contained) the equipment hereinafter described for the electrical reproduction of sound in synchronism with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, and to employ (to the extent necessarily involved in such use of said equipment) the methods and/or systems of Products, under all United States patents and applications for United States patents, relating to said equipment or to such use thereof, which are

(Deposition of R. Earle Anderson.)

now owned or controlled, or which may during the term of this agreement be owned or controlled by Products, or in respect of which it has or may hereafter during the term of this agreement have the right to grant such license.

Service Day.

(b) Products agrees to install in the Theatre sound reproducing equipment (herein referred to as "Equipment"), as follows:

TYPE 2-S EQUIPMENT

Designed for use with Two Simplex Projectors for Film and Disc Reproduction

and will endeavor to complete such installation on or before, 192....., which shall be known as the "Tentative Service Day." Nothing herein contained shall be considered as a firm agreement on the part of Products to complete the installation of the Equipment on or before the said date, it being understood that the extent of the obligation of Products in this respect is limited to using its best efforts to procure the manufacture and delivery of the Equipment and to installing the same expeditiously. The day on which installation of the Equipment shall be completed and the Equipment made available to the Exhibitor as ready for public exhibition whether prior or subsequent to the "Tentative Service Day" shall be known as the "Service Day."

(Deposition of R. Earle Anderson.)

Use of Equipment.

2. The Exhibitor agrees that it will use and employ the Equipment only in the Theatre, and that it will at all times during the period of this license keep, maintain and operate the Equipment in the manner from time to time prescribed by Products and in no other manner. The Exhibitor recognizes the highly technical mechanism and art involved in the inventions and construction of the Equipment, and in the making of sound record (in any form) for use therewith, [120] and that the prestige and business reputation of Products might be seriously affected by imperfect operation of the Equipment or by its use with sound records which are not suited to it or which produce inferior results when used with the Equipment, and that use of said Equipment otherwise than as herein licensed may involve infringement of patent rights. Therefore, in order to secure and insure the functioning of the Equipment to the satisfaction of the parties hereto, the Exhibitor shall not, without the written consent of Products, move, alter, change or modify the Equipment, nor add anything thereto nor take anything therefrom; nor break the seal upon any part or collection of parts which is or may be sealed by Products; nor operate, use or employ the Equipment in any manner in conjunction with any sound record not made under license from Products for such use, unless such sound record is of such char-

(Deposition of R. Earle Anderson.)

acter that the Equipment will operate properly, reliably and efficiently to reproduce sound from such sound record with accuracy of quality and adequacy of volume. Also, in order further to secure proper functioning of the Equipment as aforesaid satisfactorily to the parties hereto, it is agreed that all additional and renewal parts and assembled parts for the Equipment shall be obtained from Products. Nothing herein contained, however, shall be construed as prohibiting the Exhibitor from taking all reasonable steps, consistent with the general intent hereof, either alone or together with Products, to protect, correct, or repair the Equipment in the event of an accident or breakdown. The Exhibitor agrees that prior to the first public use in the Theatre of each film and/or sound record, it will cause such films and/or sound records to be run privately upon the Equipment for the purpose of ascertaining that the Equipment is in satisfactory condition and adjustment for the particular film and/or sound record. The Exhibitor expressly agrees that if at any time the Equipment fails to function satisfactorily, it will immediately notify Products by registered mail and telegraph, and the absence of such notification shall be conclusive as to satisfactory functioning of the Equipment.

Removal to another theatre.

3. In the event that the Exhibitor shall for any reason cease to manage or to operate the Theatre,

(Deposition of R. Earle Anderson.)

Products will, at the request of the Exhibitor, remove the Equipment to and install the same in another theatre designated by the Exhibitor and satisfactory to Products, provided, however, that the cost of such removal and installation shall be borne by the Exhibitor and that a new agreement for the unexpired term of this license shall be executed by the exhibitor operating such theatre (the Exhibitor hereunder thereupon becoming guarantor to Products of the performance of such new agreement).

Instruction and inspection service.

4. Products agrees to instruct the motion picture machine operators of the Exhibitor in the manner and method of operating the Equipment, and will issue to each operator who has, in its opinion, satisfactorily completed a course of instruction in the operation of the Equipment, a certificate to that effect. Products further agrees, in order to perfect such instruction, and also in order to superintend the operation of the Equipment, to keep in attendance at the Theatre during the hours of performance and at such additional hours as may be necessary, an engineer or other person skilled in such operation for a period of one week following the day upon which the installation is completed and the Equipment made available to the Exhibitor as ready for public exhibition. Products also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been in-

(Deposition of R. Earle Anderson.)

stalled. Products may from time to time install such spare and renewal parts as may, in its opinion, be necessary to the satisfactory operation and maintenance of the Equipment. [121]

Installation charge

5. The Exhibitor agrees to pay to Products in New York Exchange an initial charge of Ten Thousand Five Hundred Dollars (\$10,500.00) payable as follows: The sum of One Thousand One Hundred Thirty Dollars (\$1,130.00) on or before the execution of this instrument, receipt of which is hereby acknowledged, and the sum of One Thousand Four Hundred Ninety Five Dollars (\$1,495.00) by a demand promissory note satisfactory to Products in the amount last mentioned, made by the Exhibitor and delivered to Products on or before the execution of this agreement and bearing no interest prior to presentation. which demand note Products agrees not to present for payment prior to the "Service Day," and the balance by a Series of Twelve (12) promissory notes, each in the principal amount of Six Hundred Fifty Six and 25/100 Dollars (\$656.25) satisfactory to Products made by the Exhibitor and delivered to Products on or before the execution of this instrument, the first of said notes maturing one month after the "Service Day" and the remaining notes at monthly intervals thereafter, and all bearing interest at the rate of 6% per annum

(Deposition of R. Earle Anderson.)

from the "Service Day." Products is hereby authorized by the Exhibitor to enter upon the face of any notes given hereunder, when the "Service Day" is determined by it the respective maturity dates thereof and the date from which interest shall run. Upon the failure of the Exhibit to pay any of the said notes as and when the same become due all of the said notes shall forthwith become due and payable.

Service inspection charge

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be \$..... per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of \$..... per week.

(Deposition of R. Earle Anderson.)

Transportation charges

7. The Exhibitor agrees to pay the cost of transporting the Equipment from the place of shipment to the Theatre, and to accept delivery thereof from the common carrier and make payment directly to the common carrier of freight and express charges thereon. The Exhibitor will also arrange for any necessary loading, trucking and unloading to put the Equipment down inside the Theatre, and will directly defray the cost thereof.

Payment for parts, etc.

8. The Exhibitor agrees to pay to Products its list installation charges as from time to time established for any additional equipment or spare or renewal parts, furnished or supplied by Products, upon delivery thereof and to pay the transportation charges thereon. The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connection with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for.

Changes in theatre

9. The Exhibitor warrants that the Theatre is or before said Equipment is installed will be supplied with suitable electric current; electric power leads of suitable capacity with outlets conveniently located for power supply to the Equipment; suitable space, properly ventilated, for the installation of the storage batteries and charging equipment; drapes for

(Deposition of R. Earle Anderson.)

acoustic purposes, and suitable support for horns, and agrees to make such other reasonable changes, alterations and modifications as may be necessary [122] for the proper installation and accommodation of the Equipment, all at the expense of the Exhibitor and when and to the extent and in the manner prescribed by Products or its engineers, and agrees to comply with all local laws and ordinances relating to the use and operation of the Equipment and with any Fire Insurance Underwriters' requirements.

Title to Equipment

10. Title to and ownership of all equipment at any time furnished hereunder and also all tools of all kinds, drawings, prints and written descriptions and instructions, remains vested in Products.

Taxes

11. The Exhibitor shall bear and discharge promptly any and all personal property taxes which may be charged or levied in connection with the Equipment.

Access to equipment

12. The Exhibitor will permit Products, through its designated agents, engineers and mechanics, to have access to the Theatre at all reasonable hours, for the purpose of installing and from time to time for the purpose of examining and inspecting the Equipment, and will grant to Products full opportunity to make such adjustments therein and re-

(Deposition of R. Earle Anderson.)

pair thereto as, in the opinion of Products, are necessary or desirable.

Liability for interruptions, injuries, etc.

13. Products shall not be responsible in any manner for any interruption of service arising from any cause or for any defect or change of condition in the Theatre or in the equipment thereof or in the electric current supplied thereto or for any loss or damage to persons or property in or upon the said premises for any reason whatsoever. The Exhibitor agrees to indemnify Products for, and save it harmless from any liability or injury to workmen whom the Exhibitor shall furnish to assist in the handling, installing or operating of the Equipment, and from any liability to any persons resulting from negligence of such workmen.

Events of default

14. This agreement and the license hereby granted shall, at the option of Products, terminate and come to an end upon the happening of any of the following events, hereby designated to be events of default, to wit:

(a) Upon the bankruptcy or insolvency of the Exhibitor or the assignment of any of its assets for the benefit of creditors.

(b) Upon the failure or refusal of the Exhibitor for any reason to pay any of the items or sums herein agreed to be paid by it, including the payment of any of the notes provided for in Section 5 hereof,

(Deposition of R. Earle Anderson.)

within five days after such item or sum is or may become due, and as to this provision time shall be of the essence.

(c) Upon the Exhibitor's ceasing to own or operate the Theatre, unless the Exhibitor shall previous to its ceasing to own or operate the Theatre have notified Products in writing of the date it will cease to own or operate the Theatre and shall have made provision, satisfactory to Products, for the care and custody of the Equipment or for the assumption of this agreement by the successor operator of the Theatre.

(d) Upon a breach by the Exhibitor of any of the covenants herein contained relative to the use or maintenance of the Equipment, continued for more than fourteen (14) days after notice thereof by registered mail from Products. [123]

(e) Upon the removal of the Equipment or any part thereof without the consent of Products from the location and position in which it was installed by Products.

(f) Upon the failure of the Exhibitor to accept delivery of the Equipment from the transportation company or common carrier, or to facilitate the work of Products in installing the Equipment.

In the event of a default under any of the provisions of this section at any time during the term of this license, the license hereby granted and all obligations imposed upon Products by virtue of this

(Deposition of R. Earle Anderson.)

Agreement shall, at the option of Products and whether or not it terminates this license or removes the Equipment as hereinafter provided, be suspended during the continuance of such default.

Repossession of equipment.

15. Upon termination or expiration of this license by lapse of time or otherwise, the Exhibitor will surrender up and deliver possession of the Equipment to Products in good order and condition, reasonable wear and tear and obsolescence due to proper use thereof in the manner and place and for the purpose set forth in this agreement only excepted, and Products may repossess the Equipment and may, for the purpose of reducing the same to possession, enter the Theatre or any other premises where said Equipment may be and without any legal proceedings whatever possess and remove said Equipment, and the Exhibitor agrees to cooperate in such removal. If this license shall be terminated by default, or if the Exhibitor permits any of the events of default, hereinbefore enumerated, to occur, whether or not Products shall exercise the option to terminate this agreement, Products shall thereupon have the right without notice to take immediate possession of said Equipment, or any part thereof, and for that purpose may pursue the same wherever it or any part thereof may be found and may enter, with the aid and assistance of any person or persons, the Theatre

(Deposition of R. Earle Anderson.)

or other premises of the Exhibitor and such place or places whatsoever, whether belonging to the Exhibitor or not in which the Equipment or any part thereof may be placed, and may take and seize the same to its own proper use forever, free from any right of the Exhibitor under this agreement. Products shall also have the right in like manner to enter the said premises and remove the Equipment in the event of the said premises being destroyed or damaged by fire or otherwise, to an extent which, in the opinion of Products, endangers the Equipment. The exhibitor expressly covenants that in any such event no claim will be made for damage on account of such removal or otherwise, and the Exhibitor further agrees that it will hold and save harmless Products from and against any and all claims for damages by any parties whatsoever on account of such removal.

Replacement of equipment in the
event of destruction.

16. In the event of the partial or total destruction of the Equipment during the term of this license by fire or any other cause, without fault or neglect on the part of the Exhibitor, provided the Exhibitor shall not be in default in respect to any of the terms of this agreement and provided the Exhibitor shall continue to operate the Theatre or after any necessary repairs to the Theatre shall

(Deposition of R. Earle Anderson.)

resume its operation, Products will, at its own expense, either repair the Equipment, or if in the sole judgment of Products, such destruction is so extensive as to render repair of the Equipment impracticable, install in the Theatre equipment then manufactured by or for Products as nearly similar as possible to the type of Equipment so destroyed. [124]

Patent protection.

17. Products agrees that subject to the provisions hereof it will at its own expense defend any and all actions and suits which may during the term hereof be brought against the Exhibitor for infringement of patents by reason of the use by the Exhibitor, for the purpose and in the manner contemplated by this agreement, of apparatus and equipment furnished by Products hereunder, and will pay or satisfy all judgments and decrees for profits, damages and/or costs which may be finally awarded against the Exhibitor by the Court of last resort in any such action or suit on account of any such infringement, provided that the Exhibitor shall give Products immediate written notice of such action or suit, full information and all reasonable cooperation in connection therewith and full opportunity to defend the same, and provided further, that this agreement shall not extend to any infringement or claim of infringe-

(Deposition of R. Earle Anderson.)

ment arising from any use of any of said equipment in combination with any apparatus or thing (not including films or records of Products, licenses) not furnished by Products, and that the liability of Products on account of any such infringement or claim of infringement shall be limited to its agreements in this paragraph contained and shall in no case exceed the total amount paid hereunder by the Exhibitor to Products. To the end that Products may protect itself and the Exhibitor from claims for infringement of patents, it is agreed that Products may at any time substitute for any of the Equipment or parts thereof which may have been furnished to the Exhibitor hereunder, other equipment or parts which Products shall after test determine to be equally suitable for performing the function required, such substitution to be made without additional expense to the Exhibitor and with the least possible inconvenience to it or interruption of its business.

License non-exclusive.

18. Nothing in this agreement shall be construed as granting to the Exhibitor an exclusive right or license to operate the Equipment in any particular City, Town, zone or neighborhood or as preventing or prohibiting Products from entering into similar agreements or granting licenses for the installation and use of similar equipment in competing theatres.

(Deposition of R. Earle Anderson.)

Period of license.

19. This license shall be for a term of ten years from the day upon which the installation shall have been completed and the Equipment made available to the Exhibitor as ready for use. It may, however, provided the Exhibitor shall not be in default in respect of any of the terms of this agreement, be terminated at the option of the Exhibitor at any time after the expiration of the first two years of the term hereof upon not less than six months' written notice given by the Exhibitor to Products of its intention so to terminate.

Entire understanding.

20. The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates. No agent or employee of Products is authorized to alter or modify this agreement in any way unless such alteration or modification shall be approved in writing by the President or a Vice President of Products or by such representative as may from time to time be designated in writing by either of such officers. [125]

(Deposition of R. Earle Anderson.)

No waiver by either party, whether express or implied, of any of the provisions of this agreement shall be construed as constituting a waiver of any other provision or provisions of this agreement or as estopping either party from its right to enforce any provision or all provisions hereof.

Not assignable.

21. This agreement shall not be assigned by the Exhibitor without the written consent of Products. It shall, however, subject to such restriction upon assignment by the Exhibitor, be binding upon the parties and their respective successors, assigns, and legal representatives and shall be interpreted according to the laws of the State of New York.

22. In addition to all other payments herein provided for, the Exhibitor agrees to pay promptly upon receipt of invoice therefor, Product's charges in connection with the installation of said equipment which arise by reason of such installation being without the States of the United States.

Termination clause.

23. It is hereby agreed that a certain agreement for the installation and licensing of Western Electric Sound Projector Equipment in the Coliseum Theatre at Juneau, Alaska, between Products and the Exhibitor dated July 28, 1928, be and the same hereby is in all respects terminated.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their

(Deposition of R. Earle Anderson.)
duly authorized officers in their behalf, the day and
year first above written.

ELECTRICAL RESEARCH
PRODUCTS INC.

By (Signed) R. E. ANDERSON
W. D. GROSS, INDIVIDUAL

In presence of

(Signed) R. B. HART
as to E. R. P. I.

As to Exhibitor

By (Signed) W. D. GROSS

PLAINTIFF'S EXHIBIT No. 3.

This exhibit is the same as plaintiff's exhibit No. 1 except that where the word "Juneau" appears in exhibit No. 1, the word "Ketchikan" appears in exhibit No. 3, and that the Ketchikan contract, exhibit 3, bears the numbers: "249600 Contract Number Alaska No. 1."

Exhibits numbers 1 and 3 are both on printed forms, except as indicated by the underscoring in the foregoing copy of exhibit 1.

(Deposition of R. Earle Anderson.)

PLAINTIFF'S EXHIBIT No. 2.

ELECTRICAL RESEARCH PRODUCTS INC.

Acoustic Department

250 West 57th Street

New York, N. Y.

Subsidiary of

WESTERN ELECTRIC COMPANY

Incorporated

September 4, 1929. [126]

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of Western Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

6. In addition to any other payments required to be made by the Exhibitor hereunder,

(Deposition of R. Earle Anderson.)

the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service and inspection payment shall be \$29.75 per week, which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means of transportation incurred in connection with emergency service visits.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Very truly yours,
(Signed) R. E. ANDERSON

Comptroller.

Accepted:

W. D. GROSS.

Exhibitor's signature witnessed by:

J. A. GAGE.

(Deposition of R. Earle Anderson.)

PLAINTIFF'S EXHIBIT No. 4.

This exhibit is the same as plaintiff's exhibit No. 2 except that where the word "Juneau" appears in exhibit No. 2, the word "Ketchikan" appears in exhibit No. 4. [127]

Thereafter, Witness Anderson then further testified: In executing the agreements of September 4th, 1929, (Plaintiff's exhibits Nos. 2 and 4) on behalf of the plaintiff, I was acting under the authority of two resolutions of the Board of Directors of the plaintiff, adopted on May 25, 1927 and June 24, 1927, respectively, which resolutions have never been revoked. [128]

Certified copies of the resolutions above referred to were admitted in evidence as plaintiff's exhibits Nos. 6-A and 6-B, respectively, and read as follows:

PLAINTIFF'S EXHIBIT No. 6-A.

I hereby certify that I am secretary of Electrical Research Products Inc., a corporation organized and existing under the laws of the State of Delaware, that as such I am custodian of the records and official seal of said company, and that the following is a true and correct copy of a resolution duly adopted by the Board of Directors of said

(Deposition of R. Earle Anderson.)

company at a meeting held at New York, New York, on June 14, 1927:

“RESOLVED, That Whitford Drake and R. E. Anderson who, by resolution adopted May 25, 1927, were authorized to sign in the name and on behalf of this company contracts for the leasing of synchronous reproducing equipments and electrical sound reproducing equipments to exhibitors be and they hereby are, and each of them hereby is authorized to sign in the name and on behalf of this company such further and additional contracts with respect to synchronous reproducing equipments and electrical sound reproducing equipments leased to exhibitors as may be requisite to terminate, modify, amend or otherwise deal with and dispose of such agreements with exhibitors in accordance with the needs of the business.”

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the company this 8th day of September, 1932.

[Corporate Seal] (Signed) H. B. GILMORE

Secretary of
ELECTRICAL RESEARCH
PRODUCTS INC.

(Deposition of R. Earle Anderson.)

PLAINTIFF'S EXHIBIT No. 6-B.

I hereby certify that I am secretary of Electrical Research Products Inc., a corporation organized and existing under the laws of the State of Delaware, that as such I am custodian of the records and official seal of said company, and that the following is a true and correct copy of a resolution duly adopted by the Board of Directors of said Company at a meeting held at New York, New York, on May 25, 1927:

“RESOLVED, That Whitford Drake and R. E. Anderson be and either of them hereby is authorized to sign in the name and on behalf of this company contracts for the leasing of synchronous reproducing equipments and electrical sound reproducing equipments to exhibitors.”

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the company this 8th day of September, 1932.

[Corporate Seal] (Signed) H. B. GILMORE

Secretary of

ELECTRICAL RESEARCH

PRODUCTS INC. [129]

G. I. ALBRIGHT.

G. I. Albright, plaintiff's witness, by deposition duly taken August 5, 1932, testified:

Direct Examination.

My present residence is Walla Walla, Washington; my age is twenty-nine years this month (July 1932) I have been employed by the plaintiff corporation as installation and service engineer from December 31, 1928, up to the present time; I was employed by plaintiff as inspector or engineer to make inspections and minor adjustments in the sound reproducing equipments in motion picture theatres in Alaska, including those of defendant in Juneau and Ketchikan, Alaska; my duties in that employment were to make general inspection of all motion picture sound equipment, adjustments either minor or major that became necessary incident to the operation of the equipment; at the time I entered upon that employment I had had seven months' previous experience doing that identical kind of work; for two years before that I was with the American Telephone Company doing similar work; I took an electrical engineering course at the Georgia School of Technology at Atlanta, Georgia; I was in Juneau all of August 24 and half of August 25, 1929, and during that time made a thorough inspection of the motion picture sound equipment in its entirety, made miscellaneous adjustments which were required through the operation of the equipment, and made a thorough check

(Deposition of G. I. Albright.)

of sound reproduction throughout defendant's theatre in Juneau and left the same in a satisfactory condition; I spent half of August 21 and all of August 22, 1929, in Ketchikan, Alaska, and during that time made a thorough inspection of the motion picture sound equipment in its entirety, made miscellaneous adjustments required through the operation of the equipment, and made a general and thorough check of sound reproduction throughout defendant's theatre in Ketchikan and left the same in satisfactory condition; it was my duty to make a report of such inspections to plaintiff and to the owner of the theatre or his representative; at the time those respective inspections were made and immediately after the work was completed, I made a written [130] report after each of those respective inspections of the sound reproducing equipment in defendant's Juneau and Ketchikan theatres; immediately after the inspection in the Juneau theatre I delivered a copy of my written report to defendant, who signed for said report, acknowledging receipt of a copy thereof, and immediately after the inspection in the Ketchikan theatre I delivered a copy of said report to L. C. Lemieux, defendant's representative and manager of his Ketchikan theatre, who signed for said report, acknowledging receipt of a copy thereof; I also immediately mailed a copy of each of said reports to the office of Electrical Research Products Inc., in Seattle, Washington;

(Deposition of G. I. Albright.)

each of those reports contained a complete statement of what I found and of the minor adjustments I made in the sound reproducing equipment upon those respective occasions in those two theatres; I did not omit from either of said reports any thing or condition that I found or did at either of said theatres; I now produce original carbon copy of my report for the Juneau theatre signed by W. D. Gross and original carbon copy of my report for the Ketchikan theatre signed by L. C. Lemieux.

Thereupon said reports were received in evidence marked, respectively,

PLAINTIFF'S EXHIBITS Nos. 7-A and 7-B., the originals of which exhibits are made a part hereof as they cannot be reproduced in typewriting or printing. [131]

DANNER KNOWLTON.

Danner Knowlton, plaintiff's witness, by deposition duly taken August 23, 1932, testified:

Direct Examination.

I reside at 710 St. Rose's Avenue, San Francisco, California; I am twenty-seven years old (1932); I have been employed by the plaintiff corporation from July 30, 1928, to date, formerly as

(Deposition of Danner Knowlton.)

inspector and now as district superintendent; I was employed by the plaintiff as inspector or engineer to make inspections and minor adjustments in the sound reproducing equipments in motion picture theatres in Alaska, including those of defendant in Juneau and Ketchikan, Alaska; my duties in that employment were installation, inspection and servicing of sound equipment; my previous experience or qualifications were: I had attended regular and special company schools; spent one year at Stevens School, Hoboken, New Jersey, and engaged in radio design and construction work with Bludworth, Incorporated, New York City; I spent three days in Juneau, Alaska, namely, October 2, 3, and 4, 1929, and on October 2 and 3, 1929, I inspected and serviced the sound equipment twice in defendant's motion picture theatre in Juneau, Alaska; I spent two days, namely September 29 and 30, 1929, in Ketchikan, Alaska, and on September 29, 1929, I inspected and serviced the sound reproducing equipment twice in defendant's motion picture theatre in Ketchikan, Alaska; it was my duty to make a report of such inspections to the theatre manager, to J. S. Briggs of Seattle, Washington, in the case of routine inspection report, and to G. M. Grosjean of Hollywood, California, only in the case of acceptance inspection report; during the course of those respective inspections, I made a written report of each of those respective inspections of the sound

(Deposition of Danner Knowlton.)

reproducing equipment in defendant's Juneau and Ketchikan theatres; immediately after the inspections in the Juneau theatre I delivered copies of my reports to [132] Charles Tuckett, defendant's manager at that theatre, who signed for the routine service inspection report acknowledging receipt of a copy thereof, and immediately after the inspections in the Ketchikan theatre I delivered copies of my reports to L. C. Lemieux, defendant's manager at that theatre, who signed for the routine service inspection report, acknowledging receipt of a copy thereof; I also mailed a copy of each of said reports to G. M. Grosjean, in Hollywood, California; and delivered copies thereof to J. S. Briggs, in Seattle, Washington; each of those reports contained a complete statement of what I found and of the minor adjustments I made in the sound reproducing equipment upon those respective occasions in those two theatres; I did not omit from any of said reports any thing or condition that I found or did at either of said theatres; I now produce original technical inspection acceptance report for the Juneau theatre, signed by myself; and original carbon copy of my routine inspection report for the Juneau theatre, signed by Charles Tuckett; and original technical inspection acceptance report for the Ketchikan theatre, signed by myself; and original carbon copy of my routine service inspection report for the Ketchikan theatre, signed by L. C. Lemieux.

Thereupon said reports were received in evidence marked, respectively,

PLAINTIFF'S EXHIBITS

Nos. 8-A, 8-B, 9-A, and 9-B,

the originals of which exhibits are made a part hereof as they cannot be reproduced in typewriting or printing. [133]

J. B. DARRAGH, JR.

J. B. Darragh, Jr., plaintiff's witness, by deposition duly taken August 12, 1932, testified:

Direct Examination.

I reside at 362 North Gardner Street, Los Angeles, California; I am twenty-six years of age (1932); I have been employed by the plaintiff as engineer and inspector from February 4, 1929, to the present date; I was employed by the plaintiff as inspector or engineer to make inspections and minor adjustments in the sound reproducing equipments in motion picture theatres in Alaska, including those of defendant in Juneau and Ketchikan, Alaska; my duties in that employment were installation, inspection and servicing of sound equipment; my previous experience was: I graduated in electrical engineering at the University of Washington; had experience as a commercial radio operator; and had regular and special instruction courses in electrical research work; I spent two days in Juneau, namely, October 30, 1929, and November

(Deposition of J. B. Darragh, Jr.)

19, 1929, and on each of those dates I inspected and made minor adjustments in the sound reproducing equipments in defendant's motion picture theatre in Juneau, making a general inspection and clearing any impairment of the sound and minor adjustments; I spent three days, namely October 27, November 18, and November 21, 1929, in Ketchikan, and on each of those dates I inspected and made minor adjustments in the sound reproducing equipments in defendant's motion picture theatre in Ketchikan; it was my duty to make a report of such inspections to J. S. Briggs, in Seattle, and to defendant; during the course of and on the same day that I made each inspection, I made a written report of each of those respective inspections of the sound reproducing equipment in defendant's Juneau and Ketchikan theatres; immediately after and on the same day of the inspections in the Juneau theatre I delivered copies of my reports to Charles Tuckett, defendant's manager at that theatre, [134] who signed for said reports, acknowledging receipt of copies thereof; and immediately after and on the same day of the inspections in the Ketchikan theatre I delivered copies of said reports to L. C. Lemieux, defendant's manager at his Ketchikan theatre, who signed for said reports, acknowledging receipt of copies thereof; I also delivered a copy of each of said reports to J. S. Briggs in Seattle; each of those reports contained a complete state-

(Deposition of J. B. Darragh, Jr.)

ment of what I found and the minor adjustments I made in the sound reproducing equipment upon those respective occasions in those two theatres; I did not omit from any of said reports any thing or condition that I found or did at either of said theatres; I now produce original carbon copies of my reports for the Juneau theatre signed by Charles Tuckett and original carbon copy of my reports for the Ketchikan theatre signed by L. C. Lemieux.

Thereupon said reports were received in evidence marked, respectively,

PLAINTIFF'S EXHIBITS

Nos. 10-A, 10-B, 10-C, 10-D, and 10-E,

the originals of which exhibits are made a part hereof as they cannot be reproduced in typewriting or printing. [135]

ROBERT C. LITTLE.

Robert C. Little, plaintiff's witness, by deposition duly taken August 27, 1932, testified:

Direct Examination.

I reside at 189 St. Johns Place, Brooklyn, New York; I am twenty-five years of age (1932); I was employed by the plaintiff corporation as installation engineer and service engineer from July

(Deposition of Robert C. Little.)

31, 1928, to March 14, 1931; I am not now in plaintiff's employ; I was employed by the plaintiff as inspector or engineer to make inspections and minor adjustments in the sound reproducing equipments in motion picture theatres in Alaska, including those of defendant in Juneau and Ketchikan, Alaska; my duties in that employment consisted of inspecting and servicing Western Electric Equipment; my previous experience was: I had been employed in plaintiff's Service Department between November 7, 1928, and December 16, 1929; I spent two days in Juneau, Alaska, namely, December 17 and 18, 1929, and on December 17, 1929, I made a regular service routine inspection of, and inspected and made minor adjustments in, the sound reproducing equipment in defendant's motion picture theatre in Juneau; I spent one day, namely December 16, 1929, in Ketchikan, Alaska, and on that day I made a regular service routine inspection of, and inspected and made minor adjustments in, the sound reproducing equipments in defendant's motion picture theatre in Ketchikan; it was my duty to make a report of such inspections to my District Supervisor and to the theatre representative; at the time those respective inspections were made, I made a written report of each of those respective inspections of the sound reproducing equipment in defendant's Juneau and Ketchikan theatres; immediately after the inspection in the Juneau theatre I delivered a copy of my report to

(Deposition of Robert C. Little.)

Charles Tuckett, defendant's representative at that theatre, who signed for said report, acknowledging receipt of a copy thereof; and immediately after the inspection in the Ketchikan theatre I delivered a copy of said report to L. C. Lemieux, defendant's [136] representative at his Ketchikan theatre, who signed for said report, acknowledging receipt of a copy thereof; I also delivered a copy of each of said reports to my supervisor when I reported back in Seattle; each of those respective reports contained a complete statement of what I found and the minor adjustments I made in the sound reproducing equipment upon those respective occasions in those two theatres; I did not omit from either of said reports any thing or condition that I found or did at either of said theatres; I now produce original carbon copy of my report for the Juneau theatre signed by Charles M. Tuckett and original carbon copy of my report for the Ketchikan theatre signed by L. C. Lemieux.

Thereupon said reports were received in evidence marked, respectively,

PLAINTIFF'S EXHIBITS Nos. 11-A and 11-B, the originals of which exhibits are made a part hereof as they cannot be reproduced in typewriting or printing. [137]

E. S. TOBEY.

E. S. Tobey, plaintiff's witness, by deposition duly taken September 6, 1932, testified:

Direct Examination.

I reside at 971 Hammond Street, West Hollywood, California; I am twenty-six years of age (1932); I was employed by the plaintiff as engineer and inspector from August 5, 1929 to October 24, 1931; I am not now in plaintiff's employ; I was employed by the plaintiff as inspector or engineer to make inspections and minor adjustments in the sound reproducing equipments in motion picture theatres in Alaska, including those of defendant in Juneau and Ketchikan, Alaska; my duties were service and inspection work; my previous experience was: I graduated from high school electrical engineering and received the company's training courses; I spent one day in Juneau, Alaska, namely, February 24, 1930, at which time I inspected and made minor adjustments in the sound reproducing equipment in defendant's motion picture theatre in Juneau, thoroughly inspecting and servicing the sound equipment; I spent one day, namely February 27, 1930, in Ketchikan, Alaska, and on that day I inspected and made minor adjustments in the sound reproducing equipment in defendant's motion picture theatre in Ketchikan, thoroughly inspecting and servicing the sound equipment; it was my duty to make a report of such inspections

(Deposition of E. S. Tobey.)

to J. S. Briggs, Seattle, Washington, and to the theatre personnel; during and immediately following those respective inspections I made a written report of each of those respective inspections of the sound reproducing equipment in defendant's Juneau and Ketchikan theatres; immediately following the inspection in the Juneau theatre I delivered a copy of my report to Charles M. Tuckett, manager of defendant's theatre, who signed for said report, acknowledging receipt of a copy thereof; and immediately following the inspection in the Ketchikan theatre I delivered a copy of said report to L. C. Lemieux, manager of defendant's theatre, who signed for said report, acknowledging receipt of a [138] copy thereof; I also delivered a copy of each of said reports to J. S. Briggs in Seattle; each of those reports contained a complete statement of what I found and the minor adjustments I made in the sound reproducing equipment upon those respective occasions in those two theatres; I did not omit from either of said reports any thing or condition that I found or did at either of said theatres; I now produce original carbon copy of my report for the Juneau theatre signed by Charles M. Tuckett and original carbon copy of my report for the Ketchikan theatre signed by L. C. Lemieux.

Thereupon said reports were received in evidence marked, respectively,

PLAINTIFF'S EXHIBITS Nos. 12-A and 12-B, the originals of which exhibits are made a part hereof as they cannot be reproduced in typewriting or printing. [139]

F. FOULON.

F. Foulon, plaintiff's witness, by deposition duly taken August 23, 1932, testified:

Direct Examination.

I reside at 323 South Chester Avenue, Pasadena, California; I am thirty-one years of age (1932); I was employed by plaintiff as installation and service engineer from July 1, 1929, to March 7, 1931; I am not now in plaintiff's employ; I was employed by plaintiff as inspector or engineer to make inspections and minor adjustments in the sound reproducing equipments in motion picture theatres in Alaska, including those of defendant in Juneau and Ketchikan, Alaska; my duties were installation and servicing of Western Electric sound reproduction equipment; my previous experience was: I had four years' service with the Southern California Telephone Company in automatic switchboard installation, tests and inspection; instructor of switch and relay adjustments; graduated from the University of California in electrical engineering in 1928, specialized in sound transmission and radio; had one year's service with a public utility in power transmission engineering; and received four weeks'

(Deposition of F. Foulon.)

total instruction in company's special training course; I spent five and one-half months in Alaska, of which I spent the following time in Juneau, Alaska, namely, from March 23 to 29, 1930; April 26 to 29, 1930, May 16, 1930; May 24, to 27, 1930; June 20, 1930; from June 28 to July 1, 1930; July 27, 1930; from August 4 to 11, 1930; and August 30, 1930; during that time I regularly and systematically inspected and made minor adjustments in the sound reproducing equipments in defendant's motion picture theatre in Juneau, making eleven inspections thereof, which were made on the following dates: March 25, 1930; March 28, 1930; April 27, 1930; May 16, 1930; May 26, 1930; June 20, 1930; June 28, 1930; July 27, 1930; August 4, 1930; August 11, 1930; and August 30, 1930; upon each of those [140] occasions I inspected the equipment, supervised and made necessary repairs thereto; during that time I spent the following time in Ketchikan, Alaska, namely, from March 21 to 22, 1930; April 25, 1930; May 23, 1930; from June 21 to 26, 1930; from July 29, 1930, to August 3, 1930; and September 1 to 4, 1930; during that time I inspected and made minor adjustments in the sound reproducing equipments in defendant's motion picture theatre in Ketchikan, making nine inspections thereof, which were made on the following dates: March 22, 1930; April 25, 1930; May 23, 1930; June 21 and 26, 1930; July 29, 1930, August

(Deposition of F. Foulon.)

3, 1930, and September 1 and 4, 1930; upon each of those occasions I inspected the equipment and supervised repairs thereto; it was my duty to make a report of those inspections to J. S. Briggs, supervisor in Seattle, Washington, and to the theatre manager; immediately after each of those inspections I made a written report of each of those respective inspections of the sound reproducing equipment in defendant's Juneau and Ketchikan theatres; immediately after the inspections in the Juneau theatre I delivered copies of my reports to Charles Tuckett, manager of the theatre, who signed for all of said reports, except the report dated June 20, 1930, which was an appointment call report, acknowledging receipt of copies thereof; and immediately after the inspections in the Ketchikan theatre I delivered copies of said reports to L. C. Lemieux, defendant's manager and operator at his Ketchikan theatre, who signed for said reports, acknowledging receipt of copies thereof; I also delivered a copy of each of said reports to J. S. Briggs, supervisor, in Seattle, Washington; each of those reports contained a complete statement of what I found and the minor adjustments I made in the sound reproducing equipment upon those respective occasions in those two theatres; I did not omit from any of said reports any thing or condition that I found or did at either of said theatres, except, in the Juneau reports, the fact that it was impossible to obtain any but partial cooperation in

(Deposition of F. Foulon.)

the matter of making adjustments and necessary repairs and it was necessary to do most of the work myself in the Juneau [141] theatre; and except, in the Ketchikan reports, that good cooperation was obtained from the operator and manager: I now produce original carbon copies of my reports for the Juneau theatre signed by Charles Tuckett, and original carbon copies of my reports for the Ketchikan theatre signed by Louis Lemieux.

Thereupon said reports were received in evidence marked respectively,

PLAINTIFF'S EXHIBITS Nos. 13-A, 13-B, 13-C,
13-D, 13-E, 13-F, 13-G, 13-H, 13-I, 13-J, 13-K,
13-L, 13-M, 13-N, 13-O, and 13-P,

the originals of which exhibits are made a part hereof as they cannot be reproduced in typewriting or printing. [142]

H. C. HURLBURT.

H. C. Hurlburt, plaintiff's witness, by deposition duly taken August 26, 1932, testified:

Direct Examination.

I reside at 2635 Eleventh Avenue North, Seattle, Washington; I am twenty-seven years of age

(Deposition of H. C. Hurlburt.)

(1932); I was employed by plaintiff as installation and service engineer from January 6, 1930, to February 13, 1931; I am not now in plaintiff's employ; I was employed by plaintiff as inspector or engineer to make inspections and minor adjustments in the sound reproducing equipments in motion picture theatres in Alaska, including those of defendant in Juneau and Ketchikan, Alaska; my duties were installing and servicing Western Electric theatre sound systems; my previous experience was: I was a graduate of the University of Washington in electrical engineering, and had been trained in the Engineering School of the plaintiff at Hollywood, California; I was in Alaska from December 22, 1930, to February, 1931, and I was in Juneau, Alaska, from December 23, 1930, until January 25, 1931; during that time on three occasions, namely, December 24, 1930, January 20, 1931, and January 24, 1931, I inspected and made minor adjustments in the sound reproducing equipment in defendant's motion picture theatre in Juneau, on each of those occasions inspecting that equipment and making necessary adjustments; I spent part of December 22, 1931, and the period commencing January 26, 1931, and ending February 13, 1931, in Ketchikan, Alaska; during that time on three occasions, namely, December 22, 1930, January 27, 1931, and February 10, 1931, I inspected and made minor adjustments in the sound reproducing equipment in defendant's

(Deposition of H. C. Hurlburt.)

motion picture theatre in Ketchikan, on each of those occasions inspecting that equipment and making all necessary adjustments; it was my duty [143] to make a report of such inspections to J. S. Briggs, in Seattle, and to the theatre manager; immediately after each of those inspections, I made a written report of those respective inspections of the sound reproducing equipment in defendant's Juneau and Ketchikan theatres; immediately after the inspections in the Juneau theatre I delivered copies of my reports to C. M. Tuckett, manager of defendant's theatre, who signed for said reports, acknowledging receipt of copies thereof; and immediately after the inspections in the Ketchikan theatre I delivered copies of said reports to defendant's manager at his Ketchikan theatre, who acknowledged receipt of copies thereof; the report made on December 22, 1930, was signed by L. C. Lemieux, who was then manager of defendant's Ketchikan theatre, and the reports of January 27, 1931 and February 10, 1931, were each signed by F. L. Stannard, who on those occasions was manager of defendant's Ketchikan theatre; I also delivered a copy of each of said reports to J. S. Briggs, in Seattle; each of those respective reports contained a complete statement of what I found and the minor adjustments I made in the sound reproducing equipment upon those respective occasions in those two theatres; I did not omit from any of said reports any thing or condition that I

(Deposition of H. C. Hurlburt.)

found or did at either of said theatres; I now produce original carbon copies of my reports for the Juneau theatre signed by Charles Tuckett and original carbon copy of my reports for the Ketchikan theatre signed by L. C. Lemieux and F. L. Stannard.

Thereupon said reports were received in evidence marked, respectively,

PLAINTIFF'S EXHIBITS

Nos. 14-A, 14-B, 14-C, 14-D, 14-E, and 14-F, the originals of which exhibits are made a part hereof as they cannot be reproduced in typewriting or printing. [144]

RALPH E. LAWRENCE.

Ralph E. Lawrence, plaintiff's witness, being first duly sworn, testified:

Direct Examination.

I live at 330 North Holly Street, Medford, Oregon; I am thirty-five years old; I am and have been, continuously since 1929, employed by plaintiff as service engineer; my previous experience or training was: instruction in the United States Naval Training Radio School, Goat Island and Mare Island, California, from May, 1918, to March, 1919, with considerable previous experience in amateur

(Testimony of Ralph E. Lawrence.)

radio and electrical equipment, and subsequent to discharge from the Navy employment by the United States Motor Manufacturing Company, in Los Angeles; I attended the Y. M. C. A. Radio School in Los Angeles from January until June, 1920, when I received a United States Department of Commerce first-grade radio license which I held continuously until 1933; I attended the Pacific Radio School in Los Angeles from July until October, 1920, and specialized in art and vacuum tube transmission and then worked for the Federal Telegraph Company in San Francisco as radio operator on passenger vessels going to South America; I went to work for the United States Shipping Board in May, 1921, and with R. W. White conducted a number of experiments in Australia, Tasmania, New Zealand, and South Africa in the use of radio telephone for the broadcasting of music and voice; I returned to New York in February, 1932, thence to the West Coast where I was again employed by the Federal Telegraph Company as chief operator aboard several passenger vessels, and in February, 1923, I went to work for the Southern California Edison Company, which at that time was building a hydro-electric project at Big Creek, California; while there I assisted in the design and operation of a radio system between the various camps; I was there until December, 1923, and then engaged in private business in Los [145] Angeles until 1929; in 1926 I was invited to become radio operator and

(Testimony of Ralph E. Lawrence.)

technician on the flight of the Southern Cross from California to Australia; in the fall of 1928, I took the Civil Service Examination for radio operator and technician in the Department of Commerce and was subsequently offered a position at the Oakland Airport in August, 1929, but rejected that in order to go to work for plaintiff, although in the meantime I had accepted employment as chief radio operator aboard the Calalie of the Mackay Radio Corporation, which position I held until I went to work for plaintiff in September, 1929, at which time I was given a specific course of instruction relative to talkie equipment under a special engineer sent out from New York in the laboratories, being a very tough six months course in three weeks relative to new equipment, physics of acoustics as applied to auditoriums, optical equipment, electric cell, motor control boxes, and their rather complicated circuits, equipment such as Western sound equipment; I was then sent out on a number of jobs with experienced men rendering acoustic service to theatres and installing Western Electric sound equipment in theatres being in that department from October 1, 1929, to January 1, 1930, when I was transferred into the service department and assigned to a group of suburban theatres in Seattle under the direct supervision of J. S. Briggs, which department had a number of experienced service men including Briggs, Russell Carson, R. C. Little, and George Corby, all located in

(Testimony of Ralph E. Lawrence.)

Seattle, who could give me a little help if I needed it; I was located there until March, 1930, when I was sent to Los Angeles to another service school held by plaintiff and given another intensive drilling in equipment and diagnosis of troubles, covering details in regard to diagnoses, quick remedy of troubles, and emergency operations; I was then sent back to Seattle and assigned to a territory in Spokane, Washington, as I was then considered sufficiently experienced to take over a group of theatres in a more remote locality; I remained in Spokane servicing all theatres in that territory until September, 1930, when I first [146] came to Alaska, arriving in Ketchikan September 8, 1930, and remaining continuously in Alaska from September, 1930, until September, 1932, except June, 1932, when I was doing some special work in municipal theatres in Seattle.

From September, 1930, until the removal of equipment in April, 1931, with the exception of the latter part of December, 1930, and January, 1931, I serviced defendant's theatres in Ketchikan and Juneau; H. C. Hurlburt, plaintiff's witness, serviced those theatres during that period of December, 1930, and January, 1931, as during that time I was travelling between Fairbanks, Anchorage, and Cordova, servicing Captain Lathrop's theatres.

Whereupon the following proceedings were had:

Q. On what date did you service Mr. Gross's theatres—the Coliseum theatre in Juneau?

(Testimony of Ralph E. Lawrence.)

A. I made a call on September 11th.

Q. Give the year please, also each time.

A. September 11th, 1930; October 7th, 16th and 20th, 1930; November 29th and December 1st, 1930; there was——

Q. Wait a minute—. Later did you go to Mr. Gross's theatre any dates after that? Those were all in 1930?

A. Yes.

Q. Did you service the Juneau theatre any dates later?

A. Yes.

Q. Will you give those?

A. In February, 1930 I was refused admission to the booth.

Q. February, 1930?

A. Yes—1931.

Q. February, 1931?

A. Yes.

Q. What dates did you actually service it in 1931?

A. On March 7th I made a service inspection there.

Q. On March 7th, 1931?

A. Yes.

Q. Did you actually service the Juneau theatre at any time [147] after that?

A. Yes.

Q. Will you give the dates as to the Ketchikan theatre, that you serviced?

(Testimony of Ralph E. Lawrence.)

A. Service visits were made in Ketchikan on October 11th, 1930 and on November 22d and 24th, 1930, and—you want me to go into 1931?

Q. If there are any dates on which you serviced it in 1931, yes.

A. In—on March 7th, on the 2d and 27th of March, 1931.

Q. What time did you get back from the Westward in 1931? What time did you get back to Southeastern Alaska, at either Juneau or Ketchikan?

A. Well, it was in the month of February. I don't remember the exact date.

Q. After returning to Juneau at that time, did you go to the Coliseum theatre in Juneau for the purpose of servicing it?

A. Yes.

Q. Did you service it at that time?

A. Well, as I read off here.

Q. Did you service it at that time—the Coliseum Theatre in Juneau, in 1931?

A. I was refused admission once.

Q. Answer "Yes" or "No".

A. No.

Q. Why didn't you?

A. I was refused admission to the booth.

Q. Who refused the admission?

A. The management.

(Testimony of Ralph E. Lawrence.)

Q. Who was "the management"?

A. Charles Tuckett.

Q. How long after that did you remain in Juneau? [148]

A. I don't remember the exact date. I was around here between boats, I would say at least three or four days.

Q. What was the next date you serviced it after that, in Ketchikan?

A. March 2d and 27th.

Q. Did you ever go to Ketchikan for the purpose of servicing that theatre after that date?

A. No.

Q. Were you in Ketchikan during that time?

A. Yes—I was——

Q. During that period were you refused permission to service the theatre at Ketchikan at any time?

A. No.

Q. Now then, in addition to these service calls you have mentioned here, Mr. Lawrence, did you actually spend any other time in Ketchikan with examining or checking out the equipment and its operation in either of these two theatres during this period?

A. Well—

Q. You can answer "Yes" or "No", Mr. Lawrence.

A. Yes.

(Testimony of Ralph E. Lawrence.)

Q. Will you please state the circumstances of that?

A. There was once or twice, the way my itinerary worked out I would usually go to Fairbanks and come back to Ketchikan and coming down from the Westward, if the boat were in port in Juneau for several hours I would endeavor to get in and determine whether or not there had been any difficulties and just a general idea of how the equipment was operating.

Q. How about Ketchikan?

A. No, that wouldn't apply there, because I—

Thereupon Witness Lawrence further testified: During these trips I spent at least three or four days in each town and [149] I spent a great deal of my time around the theatres, testing equipment troubles or suggesting means of improving operation; my calls were actually made by checking the equipment almost every day and I would attend the show at the theatre usually every night as that is part of the job, so as to check the distribution of sound in the auditorium and the quality of the reproduction. [150]

Thereupon a life-sized photograph of a Western Electric amplifier rack was introduced into evidence marked

(Testimony of Ralph E. Lawrence.)

PLAINTIFF'S EXHIBIT No. 15,
and a life-sized photograph of a Western Electric
Simplex Machine was introduced into evidence
marked

PLAINTIFF'S EXHIBIT No. 16,
which exhibits can not be reproduced in printing
or typewriting and the originals thereof are hereby
made a part hereof.

Thereupon Witness Lawrence testified further:
my first operation, when I went to the theatre to
service one of these equipments, would usually be
to discuss the situation with the manager and if
he had any troubles during the time since I had
been there last, we could get together on them and
straighten them out, if not, we would usually lis-
ten to the show, preferably together, where we could
discuss the quality and distribution of the sound in
the theatre, which, after listening to it, served as
a general guide to its quality and distribution and
provided a means of checking each horn until in-
dividually because they are located backstage; after
that we would go to the booth where the talkie
equipment was situated, and talk over with the
operator the equipment, its functioning, and diffi-
culties experienced so that I could better know
what I would have to do other than the routine
service of the equipment; after ascertaining that

(Testimony of Ralph E. Lawrence.)

information I then usually proceeded to the amplifier rack, plaintiff's exhibit No. 15, and first investigated the horn panel designated No. 17, making a visual inspection of the front parts in order to determine that the dial switches which are numbered 1, 2, 3, 4, 5, and 6 on this exhibit, were correct as they provide a means of obtaining a correct match between the output of the system and the sprockets, and I would check them visually to determine that they were on the proper setting and periodically clean the contacts to prevent any noise getting into the system which would result, if they were not clean, in the introduction of static [151] type noises or buzzes that interfere with the sound as reproduced when the actors on the stage are speaking, introducing an objectionable, extraneous noise in the auditorium, and if they were not properly matched or aligned, the quality of sound would suffer; I would also remove the back of the horn panel "17" on exhibit No. 15, exposing the internal wiring and these keys, which could also be designated 1, 2, 3, 4, 5, and 6, controlled the output of sound from each horn; the last key on the exhibit is designated on the exhibit "R & E"; the lowest keys are burnished periodically, which serves the same purpose as matching and cleaning the dial switches, as those keys are apt to become corroded and would introduce extraneous noise into the sound reproduced in the auditorium; the key "R & E" is also burnished as to its wiring to determine if it is

(Testimony of Ralph E. Lawrence.)

brittle or has poorly soldered connections or cor-
rosions, as brittleness leads to broken wires and
loss of sound, and corrosion leads to extraneous
noises in the auditorium; the burnishing of these
keys is necessary in order to keep the equipment
in proper working order; I also examined the part
of exhibit No. 15 that is designated by "17", and
if there were any indications of poorly soldered
connections, would resolder them because if that
was not done there would be a loss of sound from
one or the other of the horns, or both, depending
upon the particular wire, and I would check the
41-A amplifier, designated "7" on exhibit No. 15,
which is provided with plate current meter on the
left-hand side, designated "Plate" current on the
exhibit, and the socket meter on the right-hand side
of the meter designated "Filament" current; if they
are not in proper working order the sound in the
auditorium becomes noticeably bad; I would also
remove the cover from this box in the center of
the amplifier shown in the exhibit, exposing three
tubes located in spring sockets in rubber sheathing
and visually check those tubes and then clear the
two prongs and check for corrosion the wire located
behind those tubes, because any corrosion accumu-
lating on the tube prongs [152] or sockets indicates
itself by a noise of the frying or static type, and
the tube located in No. 3 socket provides an electric
match between amplifier No. 7 and amplifier No. 8,
which follows it in the circuit, and if there is no

(Testimony of Ralph E. Lawrence.)

electric match a loss of quality of sound as reproduced in the auditorium occurs, that is, the entire range of frequency from real low notes to real high notes would be interfered with; I also expose the condensers, transformers, and choke coils, all of which are component parts of the amplifier designated No. 7 on exhibit No. 15, by removing the cover on the back of the rack, thus providing means of inspecting the gain control, which is at the left-hand corner where there are a group of figures on the exhibit running from 1 to 23 on the face of the dial, which indicates the setting of the gain control, and also allows us to get at the rheostat, which is indicated by the filament control and filament switch located in the lower right-hand corner of panel No. 7 on exhibit No. 15, and the filament control rheostat is in the upper right-hand corner of that panel; that rheostat provides means of controlling the filament current indicated by this meter and is drawn by the tubes to which I referred; it has a red mark indicating where the proper amount of current is and, if the middle is not on that mark, the effect is a noise or emission from the tubes, in other words, the quality of sound will suffer to a certain extent, and the key that is located in the lower right-hand corner turns the filament current supply on and off into the amplifier itself; I also make a visual inspection of the wire, choke coils, condensers, transformers, and resistors; clean this gain control in the upper left-hand corner on panel

(Testimony of Ralph E. Lawrence.)

"7" of exhibit No. 15, in order that there might be no open circuits from the tension of the rotating element or sliding contacts that makes the contact with the tubes; the rheostat in upper right-hand corner is cleaned to prevent any extraneous noise; the key contacts are burnished or cleaned to prevent any accumulation of corrosion that might result in noisy [153] conditions in the sound in the auditorium or an open circuit that might cut off the sound; the condensers, transformers, resistors, and choke coils are checked visually in order to determine if there is any leakage of the insulation compound that seals them; it is important that they be checked in order to overcome any tendency at a future date, if they indicate a source of such trouble, as loss or introduction of sound into the system; the keys, the contacts of which are located in the back of the amplifier shown on panel No. 7 of exhibit No. 15, are also cleaned because if they are allowed to get dirty it results in a weak sound, or noise, or quits altogether; if any of these defects that I have mentioned are discovered, such as a tube in poor condition, or any other component indicates deterioration or defects, the same is replaced: the gain control that I mentioned is actually a net work for means of controlling the volume output of loudness in the auditorium spoken or sung by the actors on the stage; I would next check the 42-A amplifier, designated No. 8 on exhibit No. 15, make a visual inspection of the meter in

(Testimony of Ralph E. Lawrence.)

the center of the amplifier panel to ascertain that the plate current is within limits so as to ascertain that the quality of sound is not being distorted or is not poor, and test individually each of the tubes by removing one tube and determining the reading on the meter and replacing that tube and then taking out the next one and getting an individual check on each tube; I likewise check the rectifier tubes on the right-hand side of amplifier panel No. 8 of exhibit No. 15, the amplifier tubes being located on the left-hand side of that panel; if any individual tube falls below a certain specified limit it is removed and replaced by a new tube in order to maintain a good quality of sound at all times; as the amplifier is what is known as a push-pull amplifier, and in that type of amplifier it is necessary that these tubes be properly balanced or matched, namely, the plate currents within certain limits of five millimeters of one another in order that [154] certain frequencies will not be amplified to a greater degree than others, which would result in distortion or poor quality of sound in the auditorium; in case of difficulties in either the amplifier or rectifier tubes, I replace them with new tubes; I next inspect the tube prongs at the base of each of these tubes leading to the filaments in the base of the tubes as the filament and plate element in the tube, in order to perform its function must make proper contact and be clean; so we check for tension the spring contact in the sockets themselves

(Testimony of Ralph E. Lawrence.)

into which the prongs set, as well as check the tube prongs; if they are not tight, or if they are dirty, or if there is improper contact, they serve to introduce various types of noises such as pops, buzzes, etc. into the auditorium, and if the contact is very poor they burn, which would also cause a poor quality of sound; if the transmission from the rectifier plate to the tube is very low it is replaced; if it is a matter of poor contact in the tube socket or prongs, it is brought up to standard, but if it is the socket, we sometimes have to replace it; I also check amplifier No. 8 on exhibit No. 15 by removing the cover on the back of that amplifier; the various devices and gadgets on the back of panel No. 7 and No. 15 on this rack on exhibit No. 15 are very complicated as there is a mass of wiring and auto transformers, which is also true of these amplifiers, Nos. 7 and 8, shown on exhibit No. 15.

Thereupon a photograph representing the back of those panels was received in evidence marked

PLAINTIFF'S EXHIBIT No. 17,

which exhibit can not be reproduced in printing or typewriting and the original thereof is hereby made a part hereof.

Thereupon Witness Lawrence further testified: that in a rough way it illustrated the various ar-

(Testimony of Ralph E. Lawrence.)

rangements of gadgets and devices at the rear of the panels, spoken of by him in connection with plaintiff's exhibit No. 15; that plaintiff's exhibit No. 17 shows less complexities in the way of gadgets, gearing, etc. than actually existed on the panels of the equipment in the defendant's [155] theatres; in checking the gadgets in the equipment in the rear of panel No. 8 of exhibit No. 15, a visual inspection is made, after removing the cover, of the choke coils, condensers, resisters, and retard coils in an effort to determine if there is any leakage in those components; wires are checked for brittleness that might result in loss of sound, poorly soldered and meter connections are checked for tightness and tightened, if necessary, because if not tight the effect is a poor contact on the tubes resulting in either loss of or weak sound or noisy components in the system that would be audible to the spectators of the show when the actors spoke or sang; we check the switch located in the main part through the amplifier itself and it is periodically cleaned and a small amount of petroleum jelly or ordinary vaseline is applied as a lubricant to prevent corrosion; it is also necessary to check for cleanliness because an accumulation of dirt or corrosion would shut off the main power supply from the amplifier, cutting off all sound; a check is also made of the cable that is composed of lead wire or rubber covered wire with lead shield, coming down on the inside of rack No. 15, to determine that none of the lead shield is broken and that

(Testimony of Ralph E. Lawrence.)

all connections and wires as they go through into each individual amplifier or horn panel are in proper condition, and if they are not, they are replaced or taped up, if necessary, with friction tape which serves as insulation to prevent them from coming in contact with any part of the rack itself, which is done in order to insure that there may be no breakdown in the system from that source; the tube prongs on the back of that panel are also cleaned and this switch, marked "110 volts A C", at the bottom of panel No. 8 on exhibit No. 15 is periodically checked for tightness of contact, cleaned if necessary, and a small amount of petroleum jelly or vaseline applied, because, if not kept in proper operating condition, possible loss of entire sound would result, as it serves the same purpose in regard to filament supply and plate supply to these tubes as the [156] switch to which I referred in the back of the amplifier does to the amplifier itself, in other words, if there is an open circuit there, your entire sound is gone; I next examine the projector marked "23" on exhibit No. 16; on which exhibit the projector lamp house, the upper magazine, and the projector head itself are all supplied by the theatre as they are really not part of the talkie equipment; the upper lamp house is indicated by the word "Simplex", on the projector head by "33" on this exhibit No. 16; the sound head is indicated by "1", in other words, the part of this photograph above the line where I have written "X Y" is supplied by the theatre and the talkie

(Testimony of Ralph E. Lawrence.)

equipment comprises the other part of exhibit No. 16; there were two of these machines, exhibit No. 16, in each theatre, which are essentially identical, but there is only one rack, plaintiff's exhibit No. 15, in each theatre; in checking the equipment, plaintiff's exhibit No. 16, I usually checked the machine speed by counting the revolutions on the main drive on the projector head, either counting them off with a watch or measuring them by means of a Sterrett speed indicator; the part I first check is indicated by "1" on plaintiff's exhibit No. 16, but the speed is checked at the projector head because there is a resisting portion on that shaft providing means of gearing that element and if there is a material variation in the speed in the exact number of revolutions per minute (89 or 91 resulting in a material variation in the speed of 90 film feet per minute) it becomes noticeable; I check this part of the equipment designated as No. 1 direct to No. 5 on exhibit No. 16, as that is the heart of the sound system, the part where the sound begins; I can better illustrate that from a model of the sound head.

Whereupon a model of the sound head was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 18,
which exhibit can not be reproduced in printing or typewriting and the original thereof is hereby made a part hereof.

(Testimony of Ralph E. Lawrence.)

Thereupon Witness Lawrence further testified: exhibit No. 18 [157] is what we call a 1-A or 1-B sound unit and is the heart of the sound system itself in the film recording method of producing tone and is substantially identical with the sound unit that was in the two talkie equipments in each of defendant's Juneau and Ketchikan theatres; the first thing I check in the sound head is the meter, which is a Western meter indicated by "0" "5" "2" amperes, which gives visual information about the amount of amperes being drawn by the lamp itself, that is located in the rear compartment of exhibit No. 18; a visual inspection is made of the entire lamp itself as it supplies the source of power or illumination, causing the sound to come through this photo electric cell and through the amplifier, the photo electric cell being located on the right-hand of the entire compartment and in the sub-compartment at the extreme right side of exhibit No. 18; any pronounced improper condition of that lamp will make itself noticeable in the sound in the auditorium by the loss of volume; it is usually accompanied by noise because, when it is lighted the filament throws off a gas, darkening the condition of the lamp internally, coincidentally causing the filament to deteriorate and to sag, and it is necessary, to obtain the best sound, that the filament and lamp be the same as the slit located in the lense assembly itself; any blackening of the lamp spoils the sound, and also as the filament be-

(Testimony of Ralph E. Lawrence.)

comes more sagged it becomes weaker and tends to become microphonic, introducing noises within the vibrating elements within the lamp itself as caused by the vibration of the machine; next we check the meter connections in order to make sure they are tight, also all screw connections, and visually inspect the wiring because defects in the wiring lead to static type of noises or possible loss of sound altogether through failure of the current to reach the lense, which static type noises would be discernable by the audience in the auditorium; if the lamp is too dark to insure proper sound or continued operation of the sound itself, it is replaced; if it is all right in that respect we then check it by turning the little [158] pad, located about the center of exhibit No. 18 at the top, through this little mirror which gives a visual picture of whether or not the light from the lamp is focused properly on the slit, which is located within the lense assembly, the latter being the barrel with the little window in it mounted on the bracket on exhibit No. 18; if there is anything incorrect about that, the lamp is focused on the slit itself by means of these adjusting nuts and that enables the raising and lowering or moving backward and forward of the film and, if out of focus it is re-focused, and if in bad condition, replaced; next we check the lense barrels which are in the center of the compartment in the tope of exhibit No. 18, to determine if they are clean and if not, we clean

(Testimony of Ralph E. Lawrence.)

them; next we inspect the portion of the sound unit located in the right center of exhibit No. 18, which is composed of the film guide rollers at the top right center of the sound unit and this gauge which is removable, and adjust the pad roller assembly, the latter serving the purpose of insuring that the film moves properly as it is pulled through the machine, the film passing through there in order to reproduce the sound; I check the different guide rollers first in order to determine whether they are worn and whether any wax from the film is piling up on them, as an accumulation of wax causes the guide rollers to rotate in an eccentric manner and as the guide roller turns, causes the film to jerk as it goes by the light beam itself, resulting in a flutter or perhaps laymen would call it a long sustained note fluctuating; if the guide rollers are dirty we clean them, if worn we replace them; the sprockets must be in good condition so as to engage the film properly as the points on the sprocket must engage the sprocket holes in the film and pull it at a constant speed without any fluctuation whatever; if the sprocket is worn we take it out and reverse it in order to secure additional life; the action of the film, pulled by the sprocket, tends to undercut that portion of the teeth of the sprocket against which the film is being turned, and it is [159] important that the sprocket be in good order to prevent condition of flutter, as the condition of these things would affect the sound as heard by the audi-

(Testimony of Ralph E. Lawrence.)

ence; I also check the sound gauge, situated in the middle of the compartment on exhibit No. 18, which is removable and has tension springs to pick it up; the amount of tension of those springs is important due to the fact that it also keeps the film passing this point steadily, doesn't allow it to fluctuate in a horizontal or any other direction; if they are worn we replace them, if dirty we clean them, if insufficient tension we correct it; I next inspect the adjustment of the pad roller assembly which slides back and forth, which must be adjusted to approximately .001 of an inch which insures that the film properly engages the sprocket and at the same time doesn't cause excessive film mutilation by the little rollers pressing too firmly against the film but allows it to go through without causing the film to jump, because if the film jumps it might jump off the sprocket entirely, resulting in no sound or in a series of modulated hums; periodically the adjustment of these guide rollers is checked with respect to the sound track of the film as it passes this aperture or light beam; the sound track is located on the outside edge of the film by a series of lines across the film track itself in Western Electric recording or by a series little mountains and valleys in RCA recording; next we check the photo electric cell itself to see that it is properly conditioned and to make sure all connections are tight, also that the cell is kept in the proper position by the spring and that there are no broken con-

(Testimony of Ralph E. Lawrence.)

nections from the photo electric cell itself, because if connections are not tight it results in no sound at all in the case of this one negative connection in the upper right-hand corner, and if the anal connection, in the back of the compartment, breaks the part of the circuit leading to the film amplifier located here, then you could not stand the sound in the auditorium, because there is [160] so much amplification it would drive you out of the house so that it must be kept tight and the little box checked to determine that there is no oil welling up; that cell is mounted in a housing by means of two small screws which thread up to the box; if they become loose the noise in the auditorium becomes predominant; if there is oil it results in static or a crying sort of noise discernible by the audience; I also check the little window of this photo electric cell to determine if it is free from dirt which would result in either loss of volume or in loudness and periodically check the position or output of that photo electric cell to see that it is in good working condition and has the proper transmission or frequency element which determines the entire systems output as to quality; periodically the meters *and* checked for calibration, to see that the meter itself indicates a true reading of the actual amount of current being used; I also check the tightness of the sheet of this bracket located on this pin on the left-hand side of exhibit No. 18, as its tightness has considerable effect on the quality

(Testimony of Ralph E. Lawrence.)

of the reproduced sound in the auditorium; if loose it produces a great deal of machine noise noticeable in the auditorium and the voice or music will have superimposed on it this background of machine noise; we also periodically check the film chutes located in the central portion of exhibit No. 18 to determine that this door is closed properly, in other words, to see that this spring is not broken, because the purpose of the film chute is to protect the film as it passes from the sound unit to this part of the machine designated as the lower magazine marked No. 23 on exhibit No. 16; that is periodically checked and also removed by taking this screw out; inside are located four shoes or guides which are occasionally, after some service, worn and result in mutilated film, disclosed by scratches on the screen or on the contact resulting in a modulated hum or sound in the auditorium; if worn badly we replace them; in that center compartment on exhibit No. 18 the light passes through the lense [161] assembly that modulates or changes it into a fluctuating light, which strikes the photo electric cell which converts that modulated light beam into electric energy; that electric energy is amplified through the entire sound system back to the stage horns and is converted into sound energy; the guide rollers serve the purpose of centering the light beam itself on the sound track and damage to the film would result in poor alignment of the pad roller assembly or poor condition of the sound sprocket, which would

(Testimony of Ralph E. Lawrence.)

result in damage or mutilation of the film, the film being supplied by the exhibitor who obtains it from the producer.

Whereupon a photograph of a piece of film was introduced into evidence marked

PLAINTIFF'S EXHIBIT No. 19,

which exhibit can not be reproduced in printing or typewriting and the original thereof is hereby made a part hereof.

Thereupon Witness Lawrence further testified: plaintiff's exhibit No. 19 shows two photographic images, one of which is the sound track and the other of the picture or play itself; the sound is located on the left-hand side of the exhibit between the sprocket holes and the picture itself, and that part of the exhibit between A, the top, and B, the bottom, actually represents a picture of the sound shown on the film that goes through the machine; we always check the film stripper plate which is centered between the teeth of the sprocket, in order to prevent the film wrapping around the sprocket, to prevent breakage of the film at that point, in order to see that it is properly located with respect to the film sprocket because if not, and the film breaks, the latter will generally wind around the sprocket, and you don't want it too close on ac-

(Testimony of Ralph E. Lawrence.)

count of rubbing on the sprocket itself, but want it close enough to prevent winding around the sprocket; next after checking the sound unit, we check the amplifier designated No. 6 on exhibit No. 15; that amplifier is suspended by [162] means of coil springs, the purpose thereof to prevent vibration of the machine itself being transmitted to the amplifier as much as possible and some of those springs carry condensers of electric current and it is important that those springs be not distorted, otherwise amplifier No. 7 would be apt to bump the housing in which it is mounted probably resulting in introducing extraneous noise into the system that would be indicated in the auditorium through the stage speakers; the two tubes in the tube sockets of amplifier No. 7 on exhibit No. 15 are tested by the same means that we test the other tubes and if found defective they are replaced; it is very important that those tubes be in very good condition due to the fact that there is so much amplification from that point to the stage speakers, that any noises even of small dimensions, at that point would be very loud in the auditorium; if they are all O. K. we clean the prongs and put them back; there are also two resistors located behind this tube which we call B in the amplifier on the left-hand side of exhibit No. 16, that forms resistance network coupling with the photo electric cell to the root of the first vacuum tube and it is important that those grids should be kept in good order and contacts

(Testimony of Ralph E. Lawrence.)

tight and clean because if not you would have more extraneous noise in the system in the form of static or a crying sound; we make sure the grids in which they are fastened are tight, and check them for cleanliness, greasing them if necessary; we inspect the wiring to determine if there is any brittle wire that might break and result in loss of sound or introduction of noise in the system; we also check for calibration or accuracy of the milliammeter located at the lower left corner of this amplifier, which is there for the purpose of measuring or indicating the amount of current those tubes are drawing, and if the meter is incorrect we regulate it if it can be done locally, or if it is entirely defective, return it to the factory for repairs; we check [163] the knob at the right of the meter where there is a rheostatic control of the amount of current to the tubes; by removing those four screws, two on each end of the front of the amplifier, it exposes the internal wiring, and the rheostat can be cleaned and the meter connections tightened, and an opportunity is given to determining whether there are any poorly soldered or otherwise defective connections; I customarily clean the rheostat every trip because if not in a clean condition it has an effect on the sound; I also examine the amplifier on the right-hand side of exhibit No. 16, in connection with the terminal strip located below the main part of the amplifier itself; at that point we measure the voltage supply of the cell as it is important

(Testimony of Ralph E. Lawrence.)

that the voltage from that cell itself and the voltage supply to the filament and plates to the tubes be proportionate in order to get the maximum result obtainable from that part of the equipment; if the polarizing voltage on the electric cell is low it results in an impairment in the sound, probably in lack of volume, perhaps loudness, if too high, in distortion or lack of quality of the sound in the auditorium; if there is error in that voltage in those systems such as were in defendant's Ketchikan and Juneau theatres, if the batteries are low or old, they would be replaced so as to prevent introduction of flutter or noise; we also check that amplifier to determine if all connections are properly soldered, that there are no broken or brittle wires, no wire exposed to oil or an oil soaked condition, as a thoroughly oil soaked group of wires in cable form such as that tend to introduce noise and leakage in wires, which results in noise in the sound system reproduced in the auditorium; if any oil soaked wires are found, ordinarily we would soak it up by applying a coat of shellac; the reason that there are two distinct equipments in each theatre is, not because they are used at the same time, but in order to keep a continuous picture on the screen and also maintain continuity of sound so that there will be no [164] interruption of the picture or sound, and thereby keep a constant supply of sound in the theatre and a constant picture on the screen; those gadgets, called the attenuator strips, shown

(Testimony of Ralph E. Lawrence.)

by dots or small white circles on exhibit No. 16, are connected to the output of the film amplifier and serve to control the volume or loudness as it reaches the auditorium, and to balance the output of the two machines so that if you are running on a certain loudness and change from one machine to the other, you can maintain the continuity of the sound at the same degree of loudness, and by moving the strip located at the top, above the figure No. 19 on Exhibit No. 16, you can lower the volume of loudness of the machine, and the lower portion of the attenuator strips serves in the same respect to the disc reproduction as the other portion does to the film reproduction; if a balance does not exist then we correct it by adjusting this strip so as to keep the machines balanced at all times; this lack of balance can be checked by sitting in the auditorium and listening to the sound; we also check the switch at the top, above the amplifier, on the left-hand side marked "Film" in the center "Off", on the right-hand side "Disc", on exhibit No. 16, which switches the sound reproduced by the film equipment to the sound reproduced by the disc; the switch contacts are in the rear of the amplifier housing itself; those contacts must be cleaned and proper tension maintained in order to prevent the possibility of loss of sound or noises introduced into the system; we clean them with petroleum jelly as a means of protection against corrosion and also as a lubricant; when that switch

(Testimony of Ralph E. Lawrence.)

is in the position marked "Film" on exhibit No. 16, you are reproducing sound recorded on the film, when in the position marked "Disc", you are reproducing sound recorded on the disc; in the back of that amplifier, below the switch contacts I mentioned, there is another terminal strip and the wiring is brought in there and [165] soldered on the binding post which I check for evidence of faulty connection or deterioration; the visible portion of the wires coming out of the back of that amplifier are inspected to see whether they are broken or in an oil soaked condition; in the back part is also located the drives which must be checked for worn parts; the motor couplings which serve as couplings between the motor and main source of drive called the 709 drive, serve the purpose of a gear drive, transferring power by means of a flexible coupling; it must be flexible in order to overcome any tendency to fluctuate in speed, such as very large fluctuation; out of that gear drive are shafts, one of which comes to another drive located behind the projector head, between the projector head and the sound head, and another coming up which drives a series of gears and serves to keep the film sprocket rotating at a constant speed; those drives are checked for wear; the coupling discs in the motor couplings are checked for wear and loose screws; the gear boxes are inspected to see if they have enough grease; the Universal joints coupling, the shafts between the 709 drive and the drive causing the projector

(Testimony of Ralph E. Lawrence.)

head and the sprockets to rotate, are inspected for wear, and all parts replaced if necessary; worn parts at that point, either in the shaft or motor coupling itself, would have a decided tendency to introduce back lash which would tend to introduce flutter into the sound and would probably cause a certain amount of unsteadiness on the screen; we check the set screws in all these various units I have described to see that they are not loose which would cause the motor, for instance to rotate without rotating the other part of the equipment; we also check the brakes located below the amplifiers on exhibit No. 16, for adjustment as there are certain definite limits to which they should be applied, and a too sudden stopping is almost as bad as a freeze-up, by which I mean where [166] due to lack of lubrication or grit getting in between them, friction comes between two rotating elements causing them to expand, resulting in their getting hot and reaching the point where they stick together; if the brake is not in proper condition we adjust it to its proper stopping point, usually between five and seven seconds, and periodically the switch itself, located beneath the base on plaintiff's exhibit No. 16, is checked because there is considerable amount of oil leakage from the component parts in the mechanism and occasionally that oil will accumulate in the switch; we clean the oil out, clean the switch and check the screw connections; we also check those portions in the amplifier that work like

(Testimony of Ralph E. Lawrence.)

threads or screws, which is really a flexible conduit and which is subject to oil accumulation; they are checked with every inspection in order to determine if any considerable amount of oil has seeped out from the lowest point from which the flexible conduit reaches; that conduit is for all the wiring from the machine to other parts of the system and is connected to the main loudness control, which is located on the front wall down here between the machines, and the motor control box, which is usually located on the right-hand side of the right-hand machine; any wiring that becomes oil soaked must be checked because oil will disintegrate rubber and if the rubber disintegrates the effective part of the system is lost resulting in possible introduction of noise into the system; all the wiring is inspected, connections checked, also that single wire from the photo electric cell, numbered 5 on exhibit No. 16, is also checked; we periodically check that to determine that it isn't too loose or too tight and not oil soaked; if too tight it will vibrate like a violin string and introduce noise into the system; if too loose the effect is very much the same, as it is a very sensitive part of the entire sound system, and if it is oil soaked, it will probably reduce the volume of [167] the sound and also have a tendency to introduce those same types of noises; if oil soaked we replace it; we also checked the conduit itself to determine that it is not loose as it should be tight so that it will not pull loose and break

(Testimony of Ralph E. Lawrence.)

the wiring and lead sheathing which would result in loss of sound or noise in the system; we periodically check the pilot lights which indicate whether or not the switch *if* properly placed; next we check the turntable shown on the left-hand side of exhibit No. 16, which is driven through rubber couplings and shafts from the motor to the gear box, inspect the couplings to determine whether or not they are deteriorated or improperly aligned because if not in proper condition it would continually break the rubber couplings, and we check the reproducer arm on the left-hand side, or figure 19 on exhibit No. 16, for drift as well as the reproducer or pick-up unit itself and also determine whether or not the turntable is level and the gear box, below the turntable, indicated by the figure 19 on exhibit No. 16, is checked for oil level so as to prevent flutter which would affect the quality and naturalness of the sound; we check the equalizer, located beneath the gear part, to determine whether it is properly adjusted or not, which serves to reduce noise from that source; from that equalizer a flexible wire is run through the connecting box to the connecting block from where they are carried to the switch discussed, which is located at the top of the amplifier on the right-hand side of exhibit No. 16; those wires are checked to determine that screw connections are tight and that there are no broken connection blocks in any source; an open wire at that point would result in loss of sound; we also check

(Testimony of Ralph E. Lawrence.)

the motor, located behind the lower magazine, indicated by No. 3 on exhibit No. 16, checking the commutator on each inspection, and the brushes are checked for wear and proper setting up, the caps are cleaned, the connections are checked; faulty conditions there would result in fluctuating [168] speed of the motor, which would affect the voices making them high-pitched; we check the bearings to determine if they are overheated and about once a year the motors are taken down, old oil flushed out and clean packing put in; all removable elements on a routine inspection are checked for heat; the drives that I previously mentioned are periodically taken down and brushed out, all old grease removed and new grease added; the gears are checked internally for oil at that time and in the case of the 709 drive, the shaft is checked for loose pins, because if they become loose it might result in one of the gears inside becoming loose with the result of stripping of gears and shutting down of the machine; we check the base itself periodically, but not on every inspection trip, to determine whether it is level; we also supply or install, as is required, insulation of the legs of the base from the floor of the booth so as to prevent noise from the booth being carried into the auditorium; we check for proper alignment all the way from the point where the shafts are connected to this gear box to the motor, from the motors to the motor couplings, to the main gear reduction drive, also the chains which drive the

(Testimony of Ralph E. Lawrence.)

various component parts including the take-up reel; if the chain is excessively worn, we adjust it, keep it tight but not too tight; we open the door, indicated by No. 33 on exhibit No. 16, check the take-up tension and where the take-up reel is located on a spool that is driven by means of those chains in a group arrangement, serving to move the take-up reel and wind up the film, in order to see that it isn't too tight, because if too light it will often mutilate the film when the machine starts up and also may affect the sprocket; we check that sprocket and if it is worn reverse it in order to extend its life, and if it cannot be reversed, replace it; there is a pad roller adjustment on the sprocket similar to [169] the equipment indicated at No. 18 on exhibit No. 16, which is also checked for adjustment for the same purpose, to eliminate the possibility of its being too tight or too loose and thereby allowing the film to become disengaged from the sprocket; as those things all have an effect on the sound reproduction; we make a visual inspection of the entire machine for cleanliness, as that indicates whether or not excessive leakage from the drive exists: in defendant's theatres the panel or rack, plaintiff's exhibit No. 15, was situated behind the left-hand machine, the equipments being represented by exhibit No. 16; another part of the equipment is what is known as main loudness control, which is situated on the front wall of the booth between the two machines of which this is a picture.

(Testimony of Ralph E. Lawrence.)

Whereupon Witness Lawrence produced a photograph which was received in evidence and marked

PLAINTIFF'S EXHIBIT No. 20,

which exhibit can not be reproduced in printing or typewriting and the original thereof is hereby made a part hereof.

Thereupon Witness Lawrence further testified: exhibit No. 20 is a substantial representation of the equipment that was used in connection with defendant's two theatres; the upper part of it, which I have marked "A", is the fader, and the lower part of it is the control box; the fader regulates the volume of sound in the auditorium; its condition is checked for cleanliness or excessive wear of any stationary or rotating element; the wiring is always inspected for brittleness and deterioration, or poorly soldered connections; the screw connections are checked for tightness; the keys are periodically cleaned and inspected, the other elements are cleaned and if they are worn, we repair or replace them; the rotating element, which is composed of three spring contacts, is checked to determine that those contacts have the proper tension and are not going to open the circuit at that point due to excessive wear or lack of tension; all these conditions, if defective, [170] introduce noise into the auditorium and if they are dirty or worn excessively, might cut out the sound altogether:

(Testimony of Ralph E. Lawrence.)

any broken wires are repaired, and poorly soldered connections are checked and if necessary resoldered, and the conduit connections are checked to determine if they are tight; the motor control box, plaintiff's exhibit No. 20, has a cover on the front of the box, which can be removed, exposing the internal wirings, connections and four vacuum tubes which control the speed of the motor; that is a very complicated circuit, therefore a check is made of the tubes in the control box, the prongs are cleaned and checked to see that they make a good tight contact with all the spring contacts; the screw connections, the ground bushings and motors in those control boxes are checked, also there is a great mass of wiring, condensers, resisters, transformers, choke coils which are visually inspected and all wires are checked for soldering connections; each machine has a K F Dun 51 motor and its associated control box marked "B" on plaintiff's exhibit No. 20, which control box covers the motor that is situated in the equipment at the point indicated by the figure 23 on exhibit No. 16, and besides making a visual inspection of the various gadgets and mechanisms, the tube prongs and sprockets are cleaned; I tighten screw connections, check the fuses as to voltage and tightness of contact and periodically clean them; the equipments in defendant's theatres had batteries in them, the condition whereof were checked on the routine check; in the equipment in each of defendant's theatres there was what we

(Testimony of Ralph E. Lawrence.)

call an A box, designated by "A" on exhibit No. 15, that serves as the redistribution point for all wiring in the system, which is periodically checked in order to determine if the soldered connections in the terminal strips are all right; if defective, they are repaired or resoldered to make those connections positive because otherwise it would affect the sound; the location of the ground is also posted in that box; below that box is the horn meter signal [171] cabinet, indicating the current supplied to the horn backstage by the batteries, also terminal strip; the condition of the horn in that apparatus is periodically checked and tightened to make sure all wiring is in good order, and the rheostat situated in that box, controlling the current supplied to the horn unit field is cleaned and checked for deterioration, and replaced if necessary; all loose conditions are tightened and calibrated, and if defective replaced; the rheostat control cabinet is checked and cleaned and the two switches located near the monitor, one of which controls the power supply to the amplifier designated No. 8 on exhibit No. 15, the other of which provides the means of opening and closing the power supply to the stage and also monitor unit, are checked to insure proper contact; I see that all screw connections are tight and cleaned and if necessary petroleum jelly is applied as a lubricant and corrosive preventative; these 4-6 volt batteries which are the main power supply for the tubes located in the amplifier designated

(Testimony of Ralph E. Lawrence.)

No. 17 on exhibit No. 15, and for the tubes in the film amplifiers, indicated at the right front of exhibit No. 16, which batteries in the Juneau theatre were located on the roof above the building somewhat in the rear, in the Ketchikan theatre above the booth and in a space formed by the back and the floor and the ceiling of the booth, and which was supplied by plaintiff, were all checked for tightness of contact, connections tightened if necessary, non-oxide grease applied to prevent corrosion and tops checked and cleaned; the internal condition of those batteries was checked with a common hydrometer and distilled water added if necessary; the battery terminals inspected for tightness and if necessary tightened; also the battery charging equipment, which was furnished by plaintiff and is in this same element near the batteries themselves, was inspected on each trip to determine the condition of the two tundra bulbs that served to convert direct current into alternating current, as [172] the condition of those bulbs determines whether the filaments are sagging, and if so, it would result in forming a carbon; if necessary they are replaced; this equipment was also checked to determine whether properly fused, fuses cleaned, and checked to see whether the fuse clips were tight and the tundra bulbs soundly screwed into the sockets: the B-40 charging panel, located in the same room where the batteries and charger are located, and furnished by plaintiff, of which there was one in

(Testimony of Ralph E. Lawrence.)

each of defendant's theatres, has a number of screw connections which are checked for tightness to determine whether the wiring is in good shape and periodically all these fuses are removed and cleaned; each machine has a 12 volt supply fuse which must be cleaned periodically, and the 90 volt batteries, which serve as polarizing voltage for the photo electric cell and also for these tubes located in the amplifiers in the right front at No. 23 on exhibit No. 16 are checked and measured for voltage and age, as considerable noise may result in the system as they become old, and the fuses in those 90 volt batteries are cleaned periodically; I also check the clips holding the fuses and the soldered connections to the batteries themselves, and the ground is periodically checked to determine whether it is tight and making good contact, and whether sufficient non-oxide grease is present to overcome corrosion, as defects in the ground would introduce hums, popping, or frying noises and a defective ground might cause entire loss of sound, which noises would be discernible to the audience in the theatre; plaintiff also furnished a B box, horn cables and horns situated backstage, there being two horn units in each of defendant's theatres, which horn units were checked to see that they were functioning properly and that the cables were connected to their proper binding posts and the voltage at the horn units sufficient to maintain proper operation and its connections were tight and

(Testimony of Ralph E. Lawrence.)

that there was no internal mispoling; all the wires in the horn [173] units were checked to determine that they were in their proper positions and tight and the voltage supply ample, and were not internally mispoled; the throats of the horns must be cleaned of the dust that accumulates in them and the screen itself must be inspected to see that the little holes are in it; the screens must give off a highly reflective light in order that the picture be clear and yet must be sufficiently porous not to interfere with the sound waves from the horns, and they are periodically examined to determine if those little holes are blocked with dust or anything of that kind or whether the picture itself is being disturbed due to dirt or streakedness of the front side; as a rule screens are supplied by Erpi but I believe Gross replaced them later by a screen of his own purchasing; the horn supports or horn towers backstage must be checked to see whether or not the horns are kept in proper positions as otherwise that would result in improper distribution of sound in the auditorium itself; I believe they were supplied by Erpi but I am not sure of that fact.

I did not make on each of my visits to defendant's theatres an inspection embracing the entire scope of the inspection and examination that I have testified to; some of that work, such as changing of grease in drives, or flushing out motor bearings, is periodical and some of the items of examination

(Testimony of Ralph E. Lawrence.)

that I have mentioned aren't necessary to be made on each inspection but are done as required; I can not state the exact percentage of those particular items of inspections that I would make on each examination, but there are a number of things done on each routine call, such as testing the tubes, checking the spare parts in order to determine that they are sufficient for any emergency, and checking the photo electric cells, in order to determine that their volumes are O. K.; I might check the photo electric cell on one trip and if it was not placed in service between one trip and the next, presumably it was in the same condition as before and it [174] would not be necessary to recheck it.

I am familiar with the type of routine service report used by plaintiff's service engineers during 1929 and 1930, such as plaintiff's exhibit No. 7-A; on that report the figures under "Batteries" "Hydrometer Reading F-1 F-2" indicate the actual hydrometer readings taken from the batteries themselves; the figures under "Batteries Electro Light Level" "F-1 F-2" indicate the electro light level in those batteries; the figures under the columns "Quality Volume Surface" are based upon a code ranging from one to six, one meaning poor and six meaning good; the figures under the column headed "Fader" mean the point at which the fader was operated on the average, or the amount of volume that was required to fill the auditorium; the column headed "Setting of Horns" "Upper Left"

means the left-hand horn, and "Upper Right" means the right-hand horn; the figures under those columns indicate the point of setting of the dial switches that provide the electric match between the amplifier and horn unit; the figures under the section headed "Amplifiers and Rectifier" indicate the reading of the current for those particular plate meters; the figures under the columns headed "Turntables" indicate the checking of those various actions or parts of the turntables in the No. 1 or left-hand machine and the No. 2, or right-hand machine, which is also true of the column headed "Reproducers" and the figures under "Receivers" show the checking of the polarity and connections; under the heading "Gain Control Setting Voltage Film B Batteries", the figure 23 indicates that the gain control was wide open, and the figure 90 indicates the voltage of each of the two photo electric cell B batteries; under the heading "Battery Charging Panel" the line "Charging Rate" with the figure after "F" indicates the rate at which the batteries were being charged; the figures under the heading "Film Amplifier and Pick Up", "Motor [175] Drives and Control Cabinet" and various subheadings mean the various parts of the amplifier, pick up, motors, drives, etc. showing the condition of the various parts therein mentioned. [176]

Whereupon Witness Lawrence further testified on each occasion that I examined the talkie equipment in defendant's theatres in Juneau or Ketchikan I made a written report of the general conditions

(Testimony of Ralph E. Lawrence.)

as I found them in those respective theatres at that time; I made such a report when I visited defendant's Juneau theatre on September 11, 1930, of the general conditions that I found in the talkie equipment at that time and I served a copy of it upon defendant who signed for that report; I made a written report of my call at the Juneau theatre on September 16, 1930, and served it upon Charles Tuckett, manager, who signed for it; I made a written report of the general conditions that I found to exist in the talkie equipment in that theatre when I visited it on November 29, 1930, and delivered a copy of my report to Charles Tuckett, who signed for it; I made a written report of the conditions that I found in that theatre when I visited it on March 6 and 7, 1931, and I served a copy on Charles Tuckett, manager, who signed for it; I made a written report of the general conditions that I found in the talkie equipment in defendant's Ketchikan theatre when I visited it on October 11, 1930, and served a copy upon L. C. Lemieux, manager of that theatre, who signed for it; I made a written report of the general conditions that I found in the talkie equipment in that theatre when I visited it on November 2, 1930, and served a copy of it upon Ralph Bontrager, who was then operator at the theatre and who signed for it on behalf of L. C. Lemieux; I made a written report of the general conditions I found to exist in the talkie equipment in that theatre when I visited it

(Testimony of Ralph E. Lawrence.)

on February 26, 1931, and served a copy of it upon Frank L. Stannard, who was then manager of that theatre, and who signed for that report.

Whereupon Witness Lawrence produced copies of said reports, so signed as above stated, which reports were thereupon received in evidence, and Juneau report of September 11, 1930, marked PLAINTIFF'S EXHIBIT No. 21-A, Juneau report of October 16, 1930, marked PLAIN- [177] TIFF'S EXHIBIT 21-B, Juneau report of November 29, 1930, marked PLAINTIFF'S EXHIBIT No. 21-C, Juneau report of March 6-7, 1931, two pages, marked PLAINTIFF'S EXHIBIT No. 21-D, Ketchikan report of October 11, 1930, marked PLAINTIFF'S EXHIBIT No. 21-E, Ketchikan report of November 22, 1930, marked PLAINTIFF'S EXHIBIT No. 21-F, Ketchikan report of February 26, 1931, marked PLAINTIFF'S EXHIBIT No. 21-G, the originals of which exhibits are made a part hereof as they cannot be reproduced in printing or type-writing.

Whereupon Witness Lawrence further testified: I also made Appointment Call Reports but did not obtain a receipt for them from the defendant, although I always left a copy at the theatre; the Call Reports arose in this manner: in making a routine

(Testimony of Ralph E. Lawrence.)

inspection we would observe a certain work which had to be done and couldn't be done at that time; therefore I would go back to the theatre and do that work and originate one of these Appointment Call Reports in order to establish that I had actually done that work; these reports do not refer to the short calls that I made when I was in town only for an hour or two, but originated as I said when I observed certain conditions in making routine inspections which needed correcting, but were not corrected at the time of my original call and I corrected them later and these reports which I now produce were of the later time I spent on the job indicating that that work was done by me.

Whereupon said written reports were received in evidence marked PLAINTIFF'S EXHIBITS Nos. 22-A, 22-B, 22-C, 22-D, 22-E, 22-F, and 22-G—, the originals of which exhibits are made a part hereof as they cannot be reproduced in print or type-writing.

Whereupon Witness Lawrence further testified: These reports plaintiff's exhibits Nos. 22-A to 22-G, both inclusive, correctly represent work and various things that I did as shown thereon, in connection with the equipment in these two theatres; I made twelve actual reports altogether covering work on

(Testimony of Ralph E. Lawrence.)

these two theatres; I also called once or twice at the Juneau theatre for which I did not make any report which included the occasions when I went down to see the shows, but I do not think that occurred [178] at Ketchikan; I was familiar with the condition of the plaintiff's talkie equipment in defendant's two theatres on April 20, 1931, and each of those equipments on that date was in good condition except that they had had approximately two years' service and consequently had been worn some.

Cross Examination

Thereupon Witness Lawrence further testified: I don't remember seeing defendant's exhibit A for identification, or whether or not I ever served it upon Witness Tuckett, although I wouldn't say I didn't serve it, but I can't positively testify that I did.

Whereupon the following proceedings were had:

Q. To refresh your memory as to the date—there is no date on this paper I understand.

A. That is right.

Q. You remember the occasion when the attachment suit was brought against Mr. Gross?

A. Yes.

Q. And the occasion when his box office was attached?

A. Yes.

Q. And you remember immediately thereafter Mr. Gross put up a bond to release the attachment?

(Testimony of Ralph E. Lawrence.)

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial,—any attachment bond put up in the preceding suit is not within the issues of this case.

Mr. HELLENTHAL: No, Your Honor, but I am trying to fix the date.

The COURT: It is all set up in the pleadings.

A. Would you mind stating the occasion?

Q. Do you remember the occasion when Mr. Gross put up a bond to release that attachment?

A. I was told he did put up a bond; I didn't know it personally.

Q. You remember the time?

A. Yes.

Thereupon defendant withdrew his said exhibit A for identification, after witness Lawrence had testified that there was no signature on it and that he did not remember serving such [179] a paper; whereupon the following proceedings were had:

Q. How long was it after Mr. Gross had put up the bond in that case that you went to Mr. Gross' theatre and were refused admittance? Do you remember that?

Mr. ROBERTSON: If the court please, I object as incompetent, irrelevant and immaterial. There is no evidence in this case of any bond having been put up in the attachment

(Testimony of Ralph E. Lawrence.)

suit; and when it is offered we object as not within the case.

The COURT: My recollection is it was set up in the pleadings.

Mr. ROBERTSON: No, there is nothing in the case at all.

The COURT: Set up in the answer, as I recall it.

Mr. RODEN: No, Your Honor, there is no mention of that in the Answer at all in this replevin suit.

The COURT: In that case the objection will be sustained.

Thereupon, after further argument, the following proceedings were had:

The COURT: Go ahead.

Mr. HELLENTHAL: I am waiting for the witness to answer.

Mr. ROBERTSON: I thought the court sustained the objection.

The COURT: I do, so far as it goes to the attachment suit, with the understanding it isn't in the pleadings. My recollection is still to the contrary. I may be mistaken.

Mr. HELLENTHAL: What is the ruling of the Court?

(Last question read.)

The COURT: I think he may ask him the question with reference to fixing the time. The jury, however, will be instructed that they are

(Testimony of Ralph E. Lawrence.)

not to take into consideration anything pertaining to the attachment suit. I understand now it is not any part of the issues in the case.

Mr. RODEN: There is nothing to show an attachment bond was put up or this witness knows when an attachment bond was put up.

The COURT: The witness can answer that.

A. It is my recollection that I was barred from the booth before the attachment proceedings came up.

Thereupon Witness Lawrence further testified: That is my recollection, by referring to my diary I could tell; I have no recollection of that particular paper although I remember serving a paper, but I couldn't identify that as it; I knew the purpose [180] of the paper but didn't know what it said; the various component parts of the talkie equipment, if not handled carefully, are apt to get out of adjustment; a number of those parts are liable to get out of adjustment or repair at any moment; some of those parts would last a long time but the sound units and amplifier equipment should be handled carefully; some of the parts wear out more quickly than others; I didn't ever make an inspection of the equipment either in defendant's Juneau or Ketchikan theatres of such scope as embraced in the entire inspection examination that I described; I was service engineer in Seattle from January 1, 1930, until about April 1, 1930, working under Witness Briggs and I serviced about fifteen

(Testimony of Ralph E. Lawrence.)

suburban theatres without any assistance; I didn't service or inspect those theatres once a week.

Whereupon the following proceedings were had:

Q. Did you go to them on emergency service calls?

A. I only remember one emergency I had while I was in that territory, and I didn't go to that alone.

Q. You took another man with you?

A. I had two men with me.

Q. Where was that emergency call from?

A. The Cherio Theatre, on Queen Anne Avenue in Seattle.

Q. What time of day did that come?

A. Nine-thirty at night.

Q. Did you respond at once?

A. Yes.

Q. The operators there had your telephone number?

A. Yes.

Q. When the trouble occurred, all they had to do was to telephone you?

A. Yes.

Thereupon Witness Lawrence further testified: During the time that I was in Alaska I inspected one theatre in Ketchikan, [181] two in Juneau, one in Cordova, one in Anchorage, one in Fairbanks, and one in Prince Rupert, Canada, but the latter was not turned over to me until after plaintiff's equipment was replevined from defendant's theatres.

(Testimony of Ralph E. Lawrence.)

Whereupon the following proceedings were had:

Q. I am asking how you went about to go from one theatre to another.

A. I traveled by boat and trains.

Q. Where did you start from? Did you have a routine where you started in going about these theatres,—a regular schedule, reasonably regular?

A. Yes.

Q. Where did you start?

A. When I first came to Alaska first was the Coliseum in Juneau. From it I went to Fairbanks and worked south.

Q. You went direct to Fairbanks from Juneau?

A. Yes.

Q. In going to Fairbanks you cross the Gulf of Alaska?

A. Yes.

Q. Going to Cordova?

A. I worked Cordova on the way south.

Q. The steamer goes to Cordova?

A. Yes.

Q. Then Valdez?

A. Sometimes, sometimes it didn't.

Q. Sometimes to Seward?

A. Yes.

Q. That is the end of the steamer route?

A. Yes.

(Testimony of Ralph E. Lawrence.)

Q. How long did it take to go from Juneau to Seward by steamer, I mean the ordinary schedule?

A. I would say about three days. [182]

Q. From Seward you took the Alaska Railroad to Anchorage?

A. I took the railroad to Fairbanks.

Q. You went through to Fairbanks, that was your schedule?

A. That is right.

Q. How many trains a week does that road run from Seward to Fairbanks?

A. In the winter time one a week, in the summer there was a time when there were two a week; last summer they ran a gas car from Seward to Fairbanks.

Q. Did the gas car run all the way from Seward to Fairbanks?

A. Yes.

Q. Regular trains ran in the winter time one a week, and in the summer two a week although the regular schedule called for one a week?

A. The second train only went to McKinley Park, not all the way to Fairbanks.

Q. There was only one train a week from Seward to Fairbanks either winter or summer?

A. I could ride the freight from Fairbanks to Healey.

(Testimony of Ralph E. Lawrence.)

Q. I am speaking of passenger trains only; one passenger train from Seward to Fairbanks?

A. In winter, yes.

Q. In summer?

A. So far as I know there was, yes.

Q. So far as you know in summer there was only one?

A. Yes.

Q. There was an extra train in the summer that went as far as McKinley Park?

A. Yes.

Q. You could possibly, on some occasions when there was a freight train, get it from Fairbanks to McKinley?

A. There was always a freight train leaving the day after the [183] passenger left.

Q. How close connections could you make on that freight train with the McKinley Park train in the summer?

A. I am unable to testify that. As a matter of fact during the summer time on what they call the "Golden Circle" there was passenger traffic that ran from Seward and went to Fairbanks, that passenger service extended down and made connections with the McKinley Park train.

Q. That was only for a short period of the year that that went on?

A. That was in the summer time.

Q. While the excursion season was on?

A. Yes.

(Testimony of Ralph E. Lawrence.)

Q. How long did it take the train to get from Seward to Fairbanks?

A. Two days.

Q. Two days?

A. Yes.

Q. That was if nothing happened in the summer?

A. Well, that is what the schedule was; you left Seward at 7.30 in the morning, get into Curry that night, leave Curry the next morning, get into Fairbanks at 5.30 the next night.

Q. That is the schedule of the railroad—leave Seward at a certain time and get into Fairbanks two days later?

A. Yes.

Q. In the winter time those trains were often off schedule, were they not?

A. Not often: there were one or two occasions they were.

Q. Many snow slides on the road?

A. They used to have snow slides, yes.

Q. And citizens had to adjust themselves with reference to the time, as to what happened in connection with those [184] snow slides?

A. Yes.

Q. The snow slides had to be cleared away and sometimes it took a long time to get from Fairbanks to Seward, isn't that true?

A. I only had one experience of that sort; I didn't use the train and flew.

(Testimony of Ralph E. Lawrence.)

Q. At that time, however, there was no air-plane service across the Gulf?

A. No.

Q. No way to fly from Seward to Juneau?

A. Unless you chartered a plane.

Q. Ever hear of anyone chartering a plane in 1929 or 1930 to cross the Gulf of Alaska.

A. Yes.

Q. Who?

A. Harry Morton, at Anchorage, at one time started out with Frank Dorbrandt to come down that way.

Q. When was that?

A. I couldn't establish the date.

Q. That was not in 1929, 1930 or 1931?

A. Yes, it was.

Q. Isn't it a fact that the first plane crossed the Gulf of Alaska very much later than that?

A. I am not in a position to establish when the first plane crossed. I understood it was some time previously that Russell Miller flew a plane into Cordova.

Q. Anyhow there were no airplanes crossing the Gulf at that time?

A. No regular schedule, no.

Q. Very few crossing at this time?

A. I don't know.

Q. Isn't it a fact airplanes don't cross in the winter time [185] at all, either now or then or at any other time?

(Testimony of Ralph E. Lawrence.)

A. I couldn't say it is a fact, I don't know it.

Q. You never heard of an airplane crossing in the winter time, did you?

A. I don't know, it seemed to me I read in the paper when I was outside along about the time this strike was on, at the time of the fire in Nome there were some people flying out. I can't prove that; I just read it in the paper.

Q. Neither of those instances, however, were in the winter time, were they?

A. I couldn't say.

Q. The fire in Nome was in the Fall, in the later summer?

A. So far as I know, it was.

Q. And the strike was in the spring and summer?

A. Yes.

Q. You never heard of an airplane crossing the Gulf of Alaska in the winter time?

A. No, I wouldn't say they crossed in the winter time.

Q. In any event you never crossed the Gulf of Alaska in an airplane yourself to make service for Mr. Gross or anybody else?

A. No.

Q. After you got to Fairbanks what did you do?

A. Whatever it was required to do up there I did.

(Testimony of Ralph E. Lawrence.)

Q. You inspected the theatre there, didn't you?

A. Yes.

Q. How long after the arrival of the train did the train go back?

A. As I remember it, the train got in there on a Friday night and we left the following Thursday morning.

Q. Then it was a week between trains that you had to wait at Fairbanks, or six days? [186]

A. Yes, six days.

Q. During that six days did you keep in touch with Mr. Gross or his manager at either of these theatres?

A. What do you mean—keep in touch?

Q. Write them, or wire them or tell them where you were?

A. There was no percentage in writing. I would get there as soon as the letter.

Q. Did you wire?

A. No.

Q. Never kept them informed where you were?

A. They knew where I was.

Q. How did they know?

A. I was in the habit of keeping a schedule. As a matter of fact I made only three trips before Mr. Hurlbert came in. He was in Ketchikan in January and part of February, and during that time I was not responsible for servicing those equipments.

(Testimony of Ralph E. Lawrence.)

Q. During that time you were out of the Territory?

A. I was over in the Interior and Southwestern Alaska.

Q. You had nothing to do with servicing the equipment?

A. During that period I didn't service equipment.

Q. Mr. Hurlburt was here installing equipment in Juneau and Ketchikan?

A. Juneau and Ketchikan.

Q. Opposition equipment to Mr. Gross?

A. I don't know about that.

Q. Installing your equipment in the new theatre in Ketchikan and one in Juneau?

A. Yes.

Q. That is how he happened to be here?

A. Yes.

Q. While he was here doing that he serviced Mr. Gross' theatres? [187]

A. Yes.

Q. Did he make any visits to the Interior?

A. No.

Q. On the way back you left Fairbanks and went to Anchorage?

A. Yes.

Q. How long did you remain in Anchorage?

A. Until the next train left.

Q. That would be a week, wouldn't it?

A. Usually; depends on the boat schedules; the trains meet the boats.

(Testimony of Ralph E. Lawrence.)

Q. According to the train schedules it would be a week?

A. Yes.

Q. You couldn't get out of Anchorage for a week?

A. Not unless I wanted to fly, no.

Q. Did you ever fly?

A. I flew once from Cordova to Anchorage.

Q. You flew once to Cordova?

A. No, once from Cordova to Anchorage; that was the period I mentioned,—the time the railroad was stuck while I was there I flew from Cordova to Anchorage and on to Fairbanks.

Q. You have done that much flying in your experience?

A. No more than that.

Q. No, I mean your flying experiences over there.

A. As a matter of fact all this flying occurred after these equipments were removed; there was no train tie-ups during the time I serviced Mr. Gross' equipments.

Q. No what?

A. No train tie-ups after—during the time I serviced Mr. Gross' equipments.

Q. You did no flying during the time you serviced Mr. Gross' equipment?

A. During the time I serviced Mr. Gross' equipments the trains were not tied up; it was not necessary to use an [188] airplane.

(Testimony of Ralph E. Lawrence.)

Q. During that time you were able to travel on the trains?

A. Yes.

Q. In any event you didn't use any airplanes?

A. No.

Q. After you spent a week in Anchorage and took the train you went to Seward?

A. Yes.

Q. And the question of how long you had to remain at Seward would depend on whether there was a boat to take you out?

A. No, the boat was always there.

Q. The steamship company aimed to connect with that train?

A. That is right; they coordinated the schedules at Seward.

Q. If there had been no boat there you would not have been able to get a boat out but the steamship company and the railroad company cooperated and had the boat there?

A. The boat was always there.

Q. There, always, when you were there?

A. Yes.

Q. You wouldn't testify the boats are always there when the train arrives at Seward?

A. I could testify to only what I know, that is what occurred during the time I was traveling there.

Q. How long did it take you to get from Anchorage to Seward?

A. About half a day.

(Testimony of Ralph E. Lawrence.)

Q. Is that railroad always in repair?

A. Yes.

Q. Winter and summer?

A. Well, barring a few cases where the engine slips off the track or something it is always in good shape.

Q. That isn't such an unusual happening on the Alaska Railroad, is it?

A. I don't know; I only was up there a year or two. I can't [189] say whether it was or not.

Q. Except the times when the engine slips off the track or the track is out of repair or something the train takes about half a day from Anchorage to Seward?

A. Five hours.

Q. After you left Seward where did you go by steamer?

A. Cordova.

Q. How long did that take you?

A. Depends on the boat; some were a little faster than others. I would say it was on an average about, you might call it, a full day.

Q. Then you stopped off at Cordova?

A. Yes.

Q. How long did you stay there?

A. A week.

Q. Until the next boat?

A. Yes.

(Testimony of Ralph E. Lawrence.)

Q. There would be no way for you to get out of there for a week as a rule?

A. Coming this way?

Q. Yes, coming this way.

A. That is right.

Q. From there where did you go on the boat?

A. I would usually go to Ketchikan.

Q. How long did it take you to get to Ketchikan from Cordova?

A. Well, the "Yukon", if the gulf was pretty good, 32 hours to Juneau and depending on the tide at Wrangell Narrows, check another day from Juneau to Ketchikan.

Q. The Gulf of Alaska is often very rough, isn't it?

A. In the winter time. Hard to say. It is rough to some people and it isn't so rough to others.

Q. There is a pretty good sea running in the Gulf of Alaska at times? [190]

A. I have seen it kick up a little bit.

Q. Sometimes ships don't make good time crossing the Gulf?

A. No.

Q. If everything was all right, fair weather, you could make the time you testified?

A. No, I specified the "Yukon"; the "Alameda" and the "Northwestern" didn't do quite as well. There were several others. The "Alameda" is burned.

(Testimony of Ralph E. Lawrence.)

Q. The "Alameda" and "Northwestern" were much smaller than the "Yukon"?

A. The "Northwestern" is smaller.

Q. You had another difficulty to contend with and that is Wrangell Narrows?

A. Yes; I didn't contend with it, but it is a difficulty.

Q. I know, you didn't run the ship?

A. No.

Q. You were just a passenger?

A. Yes.

Q. But anyhow, Wrangell Narrows delayed the ship at times?

A. Yes.

Q. Ships can only pass through when the tide is full?

A. I don't know; I am not a navigator; I just went with them.

Q. You do know sometimes you had to wait for the tide at Wrangell Narrows?

A. I presume so; they would go to Wrangell or Petersburg; maybe working cargo, maybe not.

Q. There were times when you were on the ship that you went into Petersburg and lay there a long time?

A. Occasionally they would lay there over night, yes. I don't believe it occurred more than once in my experience going south, and probably once or twice coming north, during

(Testimony of Ralph E. Lawrence.)

the time I was serving Mr. Gross' equipment. [191]

Q. Then you went to Ketchikan?

A. Yes.

Q. How long did you stay there?

A. A week.

Q. Go to Prince Rupert in the meantime?

A. I wasn't going to Prince Rupert at the time we have reference to, at the time I was servicing Mr. Gross' equipment. I took over that house in June, 1931, subsequent to the removal of this equipment.

Q. How many steamers a week were there between Seward and Juneau?

A. How many steamers a week?

Q. Yes.

A. Well, at that time the "green" boats were running over there, and one boat a week on the Alaska line, is about every third week there were two.

Q. Every third week, otherwise one a week?

A. Yes.

Q. That was about the schedule in Southeastern Alaska waters, also, was it not?

A. No, there was more transportation down here; you have the "Northland", "Norco", all the "green" boats and the Canadian Pacific.

Q. You couldn't travel on the Canadian Pacific between American ports?

A. No.

(Testimony of Ralph E. Lawrence.)

Q. But the service between Juneau and Ketchikan was somewhat better than between Juneau and Cordova and Seward?

A. Yes.

Q. Steamers more frequently?

A. Yes.

Q. You would not be able to say how often you could get from [192] Juneau to Ketchikan or Ketchikan to Juneau?

A. No, I would just look at the steamers and ride them, the boats.

Q. Now then, sometimes there were two boats a day and sometimes not a boat for a week, isn't that true?

A. I presume so, yes.

Q. In the winter time there would be times you wouldn't have a boat between Ketchikan and Juneau—where you would not have a boat for ten days or two weeks?

A. I don't remember a time when it was necessary to wait ten days in either Juneau or Ketchikan in order to secure transportation between those two ports.

Q. There was usually transportation in a somewhat shorter length of time?

A. Yes.

Q. You, however remained in Ketchikan about a week?

A. Yes. I liked to ride the Alaska line boats better than the others, and to be on the safe side—it would be at least three or four days.

(Testimony of Ralph E. Lawrence.)

Q. You would have to wait that long to get an Alaska line steamer?

A. Yes.

Whereupon Witness Lawrence further testified: Some adjustments in the talkie equipment would be checked and at least tested every day; there are some minor adjustments, such as checking the focus of the exciter lamp and whether or not the horns were operating that was part of the routine we taught the operators when we put the equipment in, the horns and the matter of checking the exciter lamps; adjustments have to be made in any sound system all the time; I don't know what adjustments defendant's men made when I was not here; I made an endeavor to instruct them as much as I could.

Whereupon the following proceedings were had: [193]

Q. It isn't necessary that this equipment should be cared for by a trained engineer is it?

A. Yes.

Q. It is necessary?

A. Yes.

Q. It always has been necessary?

A. Yes.

Q. And still is necessary?

A. Yes.

Q. At the present time do you send any trained engineers to inspect the equipment at all?

(Testimony of Ralph E. Lawrence.)

A. I have a group of theatres in southern Oregon and northern California, I service all of them.

Q. How is that?

A. I have a territory down in southern Oregon and northern California on which I do my service work all the time.

Q. Don't you sell the equipment outright at present?

A. No.

Q. Doesn't your outfit sell equipment to operators?

A. I don't know what the policy of the company is. I only have certain things to do and do them; I don't know anything about the contracts.

Q. Don't you know as a matter of fact all the theatre equipment in Juneau is owned by the people that operate it, outright?

A. I don't know about that situation.

Q. You don't know your company is now selling equipment to the operators?

A. No, I don't know anything about it.

Q. You don't know the company gives them no service or inspection at all at present?

A. I couldn't tell as to the amount of service that they get, if any. [194]

Q. You don't know these theatres in Juneau are now operating without any help from your company at all?

(Testimony of Ralph E. Lawrence.)

A. I know we had service men up here last summer; that is all I know definitely about it, because I am located in a remote area and my contacts with Alaska's situation are practically nil.

Q. Don't you know at this time your company is now selling these outfits for \$1900.00?

A. No, I don't know.

Q. You don't know that?

A. In our organization we have a sales department that handles that, and my department doesn't do any selling.

Q. You don't know that?

A. No, that is not our function.

Q. Wasn't it part of the policy of your operating department during the year 1930 to keep an engineer within call all the time?

A. Where do you mean—in Alaska?

Q. Everywhere.

A. Well, in my territory I always leave a schedule where I will be, so they can contact me.

Q. Did you always leave a schedule with these boys in Juneau and Ketchikan telling them where you would be on a certain day?

A. I can't say that I did.

Q. Wasn't it the policy of your company—you are acquainted with its affairs—to keep an engineer always on call for emergencies during theatre hours?

A. On every installation we had a card which had the number of the Seattle office and

(Testimony of Ralph E. Lawrence.)

it specified it was there for emergency service.

Q. Anytime anybody got into trouble in the theatre at any hour they could call a service man? [195]

A. That was the object.

Q. That was the kind of service they got wasn't it?

A. I presume so.

Q. It is also true that your service department made an inspection of each theatre in Seattle, for instance, each week? Isn't that true?

A. No.

Q. That isn't true?

A. No.

Q. How often did they make them?

A. Depends on the theatres.

Q. Depends on the theatres?

A. Yes.

Q. How often did you make your inspections?

A. In what theatres?

Q. In those theatres you were inspecting at the time that you were there.

A. Each two weeks.

Q. You were always on call, they had your telephone number so if they had trouble you could go fix it?

A. Yes.

(Testimony of Ralph E. Lawrence.)

Whereupon Witness Lawrence further testified: These two papers that counsel now hands me appear to be plaintiff's advertisements.

Whereupon excerpts from two papers were received in evidence, marked

DEFENDANT'S EXHIBITS B AND C, respectively, and read as follows: [196]

EXHIBIT B.

EXHIBITORS HERALD-WORLD.

September 6, 1930

ASK THESE

15 QUESTIONS

before you buy your new sound equipment!

- 1 WILL I GET REGULAR SERVICE by thoroughly trained engineers to maintain high quality and prevent costly break-downs?
- 2 HAS THE COMPANY ENOUGH INSTALLATIONS to support an efficient nation-wide service organization for the 10 year life of the contract?
- 3 HAS THE EQUIPMENT AT PROVED PERFORMANCE RECORD of less than one interruption per thousand shows in several thousand theatres?
- 4 WILL A REAL STOCK OF SPARE PARTS BE AVAILABLE nearby and a service engineer on call for immediate emergency service during all theatre hours?

(Testimony of Ralph E. Lawrence.)

- 5 WILL THE PATRONS OF MY THEATRE BE SATISFIED THAT THE QUALITY of reproduction is the best and equal to that in deluxe theatres?
- 6 WILL I GET ENGINEERING SUPERVISION of my installation equal to that in deluxe theatres?
- 7 HAS EQUIPMENT BEEN DESIGNED to reproduce the high quality recording of the best pictures?
- 8 HAS THE COMPANY THE RESOURCES to carry on a large program of research and development to assure constant improvement in recording and reproducing and provide mechanical and electrical devices for future developments in the amusement field?
- 9 WILL MY CONTRACT PROTECT ME by immediate free replacements in case of fire?
- 10 HAS THE COMPANY THE STABILITY to adequately protect me on all patents?
- 11 HAS THE COMPANY A UNIFORM POLICY and contract for every exhibitor?
- 12 WILL I HAVE ACOUSTICAL ENGINEERING ASSISTANCE to correct structural and other acoustical defects?
- 13 WILL I GET ADVERTISING ACCESSORIES to cash in on a manufacturer's name popularized by national advertising?
- 14 WILL I BE ABLE TO ARRANGE EASY TERMS so I can pay out of box-office receipts stimulated by quality performance?

(Testimony of Ralph E. Lawrence.)

- 15 WILL MY EQUIPMENT BE AN INVESTMENT paying dividends over a period of 10 years—or will I—like 2,000 other exhibitors—soon have to replace it to meet the competition of better quality?

WESTERN ELECTRIC
THE
SOUND VOICE SYSTEM
OF
ACTION

Northern Electric in Canada, Distributed by ELECTRICAL RESEARCH PRODUCTS INC. 250 W. 57th Street, New York. [197]

EXHIBIT C

EXHIBITORS HERALD WORLD

December 27, 1930

ERPI SERVICE enables
you to get everything out of . . .

WESTERN ELECTRIC
NEW
PROCESS
NOISELESS RECORDING

NOISELESS RECORDING marks the greatest advance since the coming of talkies. This new delicate, scientifically developed apparatus for recording produces a result heretofore impossible—keeping out all noises resembling static—producing tones more clear-cut and life-like.

(Testimony of Ralph E. Lawrence.)

YOUR PRESENT WESTERN ELECTRIC EQUIPMENT will successfully handle these new process films without any added parts—another evidence that best results are obtained when the same make of recording and reproducing apparatus is used.

TO OBTAIN THE FULL BENEFITS of the New Process, the most minute adjustments are required to silence the reproducing equipment and maintain high quality.

AS PART OF THE REGULAR ERPI SERVICE, Western Electric equipped theatres will have skilled engineering assistance at no extra cost to bring the apparatus up to these new high standards—to get everything possible out of pictures made by the wonderful new Noiseless Recording.

WESTERN ELECTRIC EQUIPMENT—ERPI'S SERVICE—continued improvement in methods and apparatus—are all part of the policy of making available facilities that will make your investment in them pay real dividends.

WESTERN ELECTRIC
THE
VOICE
SOUND OF SYSTEM
ACTION

Northern Electric in Canada

ELECTRICAL RESEARCH PRODUCTS INC.

250 West 57th St., New York

(Testimony of Ralph E. Lawrence.)

Thereupon Witness Lawrence further testified: Plaintiff's service policy was to keep an engineer as much as possible within constant call and that was the service that plaintiff rendered under its contracts; I don't know where the ground in the defendant's Juneau theatre is located; I recall where the ground was [198] located in defendant's Ketchikan theatre.

Redirect Examination.

Thereupon Witness Lawrence further testified: I can't remember the ground in every theatre that I have inspected; I believe I inspected the ground at the Juneau theatre once; during the time that I was inspecting defendant's theatres there was a supply of spare parts kept in the Coliseum theatre in Juneau and we had a regular spare parts list which was kept in Ketchikan and Juneau; in addition we had an emergency 41-A amplifier and 42-A amplifier which were maintained by plaintiff in those theatres for the purpose of preventing shut-downs; I know nothing about the terms of plaintiff's contracts other than they specify periodical services, as those contracts are no part of my duty and I have nothing to do with them; during the period that I was making inspections in Alaska I was never delayed or held up at any time in making my regular routine calls at either of defendant's two theatres by reason of any train delays or steamer wrecks or delays. I think that the management or the operators of the Juneau Theatre knew my whereabouts,

(Testimony of Ralph E. Lawrence.)

where I could be reached, when I was either in Juneau or Ketchikan. I think they knew that because I only had five stops to make and after I had been making them for quite a while they became familiar with the fact that I went directly from Juneau to Fairbanks and I believe they were quite familiar with the fact that boats to the westward ran once a week and the train schedule meets the boats and that I would have to remain in Fairbanks for the next train and also remain in Anchorage after arriving there, for the next boat, and also the same in Cordova; during the time that I was absent in Western Alaska I never received any letters, telegrams or other calls from defendant, asking me to return for emergency inspection or examination; approximately ninety per cent of the value of periodical examinations and check-ups of the equipment in the two theatres lies in prevention of emergencies, rather [199] than overcoming them when they actually occur, and that is what the periodical inspection presumes to take care of; it is possible but not probable, that some part of the equipment may go off during operation of a show; that never happened during the time that I was inspecting defendant's theatres; I don't remember their having any reports to make due to any shut-downs on that account—the show shutting down and the necessity of refunding any money on that account; while I was inspecting the equipment in

(Testimony of Ralph E. Lawrence.)

defendant's theatres I never found it necessary to do each inspection item that I previously described in my evidence, and I don't claim that I ever made that entire examination or inspection at any one time of that equipment. [200]

Re-Cross Examination

Thereupon Witness Lawrence further testified: I made those inspections with the view of preventing breakdowns; my work amounted to more than that, though; periodically we received engineering information from our Engineering Department of new discoveries and improvements and we put those into effect in the equipments in the theatres we were servicing, having a regular service of information of that sort forwarded to us and it was our duty to see that those new devices were installed in those theatres if we could sell the defendant on the idea; I would not on every trip find something that defendant was called upon to order, but I took his order for whatever he determined was necessary and he paid for the spare parts, although there are certain items in his theatres for which he did not have to pay, for instance, modification parts for the hold-back mechanism, which is an important device and which we established and installed; that was part of our service; I can't remember all the detail of what he did pay for and what he didn't pay for; I know he ordered replacements for two or three photo-electric cells at each installation,

(Testimony of Ralph E. Lawrence.)

which he did not pay for and which cost about \$15.00 apiece; I don't remember defendant ever sending any parts to Seattle and having them repaired and bill for repairs being sent to him; I do not know that defendant had a lot of trouble with the equipment when I was away from here; there was only one instance called to my attention concerning any difficulties experienced. These periodical trips were made by me from month to month just as I described them; I went to Ketchikan and Fairbanks, and all the others I have mentioned as near as the schedules of the boats and trains would permit.

Re-Direct Examination

Whereupon Witness Lawrence further testified: I didn't have anything to do with collecting money from defendant except one time I contacted him with reference to a payment; I don't know whether he paid for additional spare parts or not, I just talked to him about one item; it is my understanding that he didn't pay for them, but I don't know that; defendant's operators reported to me no troubles, nothing more than cleaning the fader or replacing a tube that had become defective or something like that. [201]

HERBERT M. WILCOX

Herbert M. Wilcox, plaintiff's witness, being first duly sworn testified:

Direct Examination

I am now and have been vice-president of plaintiff since April 16, 1926, prior to which I was operating manager; I am personally familiar with the talkie equipment, the subject of this controversy, formerly situated in defendant's Juneau and Ketchikan theatres; I know Harry Taylor who formerly was an installation and service engineer of plaintiff and who installed those equipments in those theatres; he left Alaska July 15, 1929; while he was in Alaska he made service inspection reports covering those theatres, copies of which reports were acknowledged as having been received by defendant at his Ketchikan theatre by Charles M. Tuckett, and at his Juneau theatre by L. C. Lemieux; I now produce those reports.

Whereupon routine service covering defendant's Ketchikan Theatre, dated July 12, 1929, was received in evidence marked

PLAINTIFF'S EXHIBIT No. 23-A,
and routine service report covering defendant's Juneau Theatre, dated July 15, 1929, was received in evidence marked

(Testimony of Herbert M. Wilcox.)

PLAINTIFF'S EXHIBIT No. 23-B,
the originals of which exhibits are made a part here-
of as they cannot be reproduced in typewriting or
printing.

Thereupon Witness Wilcox further testified: I know the established value of each of those equipments on April 20, 1931, was \$6,600.00.

Cross Examination

Thereupon Witness Wilcox further testified: That valuation does not necessarily mean sales value, nor rental value for the balance of the term—I mean its arbitrary value that was established for equipments of that type that were returned from the field, determined by deducting certain factors from the original rental value; I do not mean value to plaintiff or market value or rental value, but the arbitrary valuation placed by plaintiff upon [202] it; the replacement value at that time was much less; the present price on equipment of that type, cash price, I think is around \$3,100.00; I know that in March, 1931, the 3-S equipment, which was a more modern and simplified equipment than the equipments in controversy, but which was equivalent in so far as functioning in theatres the size of defendant's, was put on the market at a price of \$3,750.00; plaintiff did not sell them outright but leased them at that price with an additional service charge, at that time, as I

(Testimony of Herbert M. Wilcox.)

recall it, of \$29.75 a week in the United States for the first six months, \$25.00 for the second six months, and \$20.00 a week thereafter for the term of ten years; shortly after that time the price was reduced \$5.00 a week; plaintiff still services machines and does not sell machines outright to theatres; there is now one machine in Juneau equipped with Western Electric equipment but it is on a rental basis and was not purchased for \$1,900.00, but there are no service charges; if the exhibitor sends for a service man he pays for it; plaintiff did not under the old system service machines once a week; in the beginning for the first six months of operation in 1929 and 1930 we serviced once a week for the first six months; when I say a week it might have been eight days one time and six another, but approximately every ten days; the second six months and thereafter, approximately every two weeks with the exception of very large de luxe houses, with a seating capacity of upward of 1,500 seats of which there were about 150 in the United States, which were serviced every week; plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away; whereupon the following proceedings were had:

Q. Besides that the various parts of the machine were sealed, so no one except a service man could touch them?

(Testimony of Herbert M. Wilcox.)

A. Only a few parts were sealed.

Mr. ROBERTSON: Object as not proper cross examination. [203]

A. There was one part that was sealed.

Q. No other part sealed?

A. No.

Q. On any machines?

A. Not so long as the account was in good standing and the equipment in operation; there was only one part sealed.

Whereupon Witness Wilcox further testified: Only one part of the equipment was sealed so that the operators couldn't fool with it; the contract contained the provision that no "seals" could be broken which applied to sealing up equipment so that it could not be used. It had nothing to do with the use of equipment in a theatre when the account was in good standing and bills paid; it was not our custom to seal them everywhere.

Whereupon the following proceedings were had:

Q. Mr. Wilcox, you were here in Juneau during the time that the machines were installed, or after they were installed?

A. I was here for six hours July the 13th, 1929.

Q. Do you recall meeting Mr. Gross at that time?

A. I met Mr. Gross at that time.

Mr. ROBERTSON: Object as not proper cross examination.

(Testimony of Herbert M. Wilcox.)

The COURT: No, it isn't proper cross examination.

Mr. HELLENTHAL: I wish to impeach the witness, Your Honor—laying the foundation.

The COURT: Very well.

Q. At that time did you have a conversation with Mr. Gross?

A. I did.

Q. Did you meet Mr. Gross at the theater?

A. I did.

Whereupon Witness Wilcox further testified: Taylor was present but I don't remember the names of any of defendant's employees who were present; I was in the operating room of the theatre; I did not say at that time that defendant had no service at his theatre and made no such statement to defendant or Taylor.

Whereupon the following proceedings were had:

[204]

Q. You didn't tell Mr. Gross if he should need somebody he could send to Seattle and pay for the service as he needed it?

Mr. ROBERTSON: Object as not proper cross examination. They have no right to prove their case on our cross-examination.

The COURT: He is adopting him as his own witness now.

A. What was the question?

Q. You never made any such statement, in which you told Mr. Gross that if he got in

(Testimony of Herbert M. Wilcox.)

trouble he could send to Seattle and pay for the service man that came up?

A. I told Mr. Gross in the event of an emergency, a man could be procured from Seattle by airplane.

Q. And Mr. Gross would pay the man for coming?

A. Mr. Gross would pay the extra charges for transportation by plane.

Whereupon Witness Wilcox further testified: I remember distinctly that I did not tell him that he would pay the man for coming; I dictated a memorandum of that conversation in October, after returning to New York, because I thought it was important as defendant had written a letter to plaintiff's general sales manager, making certain statements in respect to our conversation there; there was not a big demand for talkie equipment at the time these particular equipments were replevined; 22,000 theatres did not in April, 1931, demand such equipments; the maximum number of theatres I ever heard of in the United States was 15,000 to 18,000; in 1926, when we surveyed the market for the possible maximum number of installations, the best information we could get was that there were about 18,000 motion picture theatres in the United States and we figured the limit of a possible market was about 9,000 theatres for talkie equipments; there were fewer theatres in 1931 than in 1926; I don't know how many picture machines

(Testimony of Herbert M. Wilcox.)

were waiting for sound equipment in 1931 that couldn't be supplied.

Redirect Examination

Thereupon Witness Wilcox further testified: My conversation with defendant in the summer of 1929 was to the effect that Taylor had been in Juneau and Ketchikan continuously from the time he came up here to make the installations; that the installations had been made and the equipments were running satisfactorily; that he had [205] instructed Gross' employees in the operation of the equipments and he could be withdrawn from Juneau and Ketchikan permanently and thereafter the equipments could be serviced from Seattle and, in case of emergency, a man could come from Seattle by airplane with that extra transportation expense at defendant's cost, but plaintiff would pay for the man's salary; there was much less demand for talkie equipment on April 20, 1931, than in 1930 and 1929 and there was a slight decrease in the number of motion picture theatres actually operating; the equipment in the de luxe houses that I mentioned was much more powerful, larger and more complicated than the equipments in defendant's theatres; plaintiff has never sold outright this kind of equipment to theatres, but it did to Government institutions which could not lease the equipment, but to no one else; the valuation of \$6,600.00 placed by me upon each of these equipments on April 20, 1931, is

(Testimony of Herbert M. Wilcox.)

based upon the factors that parts of those equipments could not be used again, that parts are attached to the theatre and cannot be removed, cost of installation, and no longer any market for the disc reproducer as by that date the industry had adopted the film method of recording and reproducing as standard. [206]

R. H. PEARSALL

R. H. Pearsall, plaintiff's witness, being first duly sworn testified:

Direct Examination

I am assistant credit manager, with headquarters in Los Angeles, of plaintiff's Western Division, which comprises California, Oregon, Washington, Montana, Wyoming, Idaho, Nevada, Arizona, Hawaii, and Alaska, which position I have held since December 1, 1929, prior to which I was in the office of the operating department; plaintiff's Los Angeles office kept records of defendant's accounts in respect to his Juneau and Ketchikan theatres during the time that the equipments were in those theatres, which accounts were kept separately, and all monies paid by defendant upon either of those accounts were paid into the Los Angeles office; I am personally familiar with those accounts, and it was my duty to see and know that they were correctly kept; I now produce the original entries of those accounts

(Testimony of R. H. Pearsall.)

of those two theatres which were either made by myself or under my direct supervision covering defendant's payment of service charges and for merchandise.

Whereupon plaintiff's original entries of account were received in evidence marked Plaintiff's Exhibits Nos. 24-A and 24-B, respectively, with authority to substitute photostatic or certified copies in lieu thereof.

Thereupon Witness Pearsall further testified: Defendant was billed the weekly service charge of \$29.75 for his Juneau Theatre for the period of May 12, 1929, through March 7, 1931, and he paid those weekly service charges for the period from May 12, 1929, through May 24, 1930, fifty-four weeks, a total of \$1,606.50 for that theatre, and he was also billed for additional or spare parts equipment for \$148.36 of which he paid \$119.27, leaving \$29.09 unpaid; no charge was made against him for the amplifiers and spare parts that plaintiff held as stock in Juneau and he made no payment upon them; the list installation charge of those amplifiers held in reserve in Juneau, was around \$250.00 apiece; I now produce invoices and shipping orders, for this additional and spare parts [207] equipment, for which defendant receipted.

(Testimony of R. H. Pearsall.)

Thereupon said invoices and orders were received in evidence, marked Plaintiff's Exhibit No. 25.

Whereupon Witness Pearsall further testified: The spare parts and additional equipments shown in Plaintiff's Exhibit No. 25 were billed to defendant at plaintiff's established list installation charges; defendant was billed for the weekly service charge of \$29.75 for his Ketchikan theatre from May 26, 1929, through March 7, 1931, and he paid those weekly service charges for the period of May 26, 1929, through May 27, 1930, Fifty-two weeks totaling \$1,547.00, and made no other payment thereon; additional or spare parts equipment was billed to defendant on account of his Ketchikan theatre at plaintiff's established list installation charges totaling \$207.64, of which he paid \$145.72, leaving \$61.92 no part of which he ever paid; plaintiff has the original orders for that spare parts and additional equipment and his receipts therefor, signed by defendant or his manager, which I now produce.

Whereupon said orders and receipts were received in evidence marked Plaintiff's Exhibit No. 26.

Thereupon Witness Pearsall further testified: In addition to the additional or spare parts on plain-

(Testimony of R. H. Pearsall.)

tiff's Exhibit No. 25, in respect to defendant's Juneau theatre, plaintiff also kept two amplifiers in Juneau for which defendant did not pay; I now produce the original records showing the equipment and mechanisms that plaintiff furnished to defendant at his two theatres as free replacements and for which no charges were made against him and for which he receipted.

Whereupon a list of free replacements was received in evidence marked Plaintiff's Exhibit No. 27.

[208]

Cross Examination

Thereupon Witness Pearsall further testified: I have been in Los Angeles since November 15, 1928; George C. Pratt is now in charge but Nathan Levinson was in charge of our office there when I came with plaintiff in 1928; he remained there until some time in 1930 but is not there now; those bills showing the different parts plaintiff billed defendant for his two theatres came from plaintiff's accounting office but a copy was sent to our office in order to complete our records; it is quite possible some of those bills are not only for merchandise but also for repairs; the bills for service charges included service charges only; plaintiff's Los Angeles office on April 8, 1930, received a payment of \$538.00 from defendant that was applied on the weekly service charge against defendant's Juneau theatre

(Testimony of R. H. Pearsall.)

from February 8, 1930, through March 29, 1930, and on defendant's Ketchikan theatre for the same period, and also paid an invoice of March 20, 1930, for \$31.00 on the Juneau theatre, and an invoice of like amount of same date on the Ketchikan theatre; I really can't say when plaintiff first commenced to bill defendant for weekly service charges; I could not possibly state that the bill dated September 11, 1929, was not the first bill sent defendant for service charges; defendant paid through our office some \$3,150.00 on these service charges, the first payment being made in January, 1930, when he made a payment of \$1,979.60; I don't know whether it was paid directly to the Los Angeles Office or not because, if it was received at plaintiff's Seattle Office, the latter sent it to the Los Angeles Office for deposit; I know nothing about these service charges except the amount of them; the Los Angeles Office received a payment on January 3, 1930, of \$1,979.60, and of \$301.10 on February 12, 1930, of which \$238.00 was applied on service charges, and on April 8, 1930, the \$538.00 payment spoken of before, and on November 10, 1930, \$500.00, of which \$476.00 was applied against weekly service [209] charges, totaling some \$3,100.00 and odd dollars.

Redirect Examination

Whereupon Witness Pearsall further testified: Of the \$1,979.60 payment on January 3, 1930, \$1,963.50 was applied against weekly service charges,

(Testimony of R. H. Pearsall.)

the balance to payment of parts; of the \$538.00 payment on April 8, 1930, \$238.00 was applied on eight weeks' service charges to the Juneau theatre and the same amount to eight weeks' service charges to the Ketchikan theatre.

Recross Examination

Thereupon Witness Pearsall further testified: Plaintiff's Los Angeles records show the date that this money was received at that office and what the transactions were. [210]

The portions of
PLAINTIFF'S EXHIBITS 24-A, 24-B. 25 and 26
material and pertaining to the additional or spare
parts equipment are as follows:

Plaintiff's Exhibit 24-a: Original ledger sheets, showing additional and spare parts charged against defendant account his JUNEAU THEATRE, totaling \$148.36, with credits of \$119.27.

Plaintiff's Exhibit 24-B: Original ledger sheets, showing additional and spare parts charged against defendant account his KETCHIKAN THEATRE, totaling \$207.64, with credits of \$145.72.

Plaintiff's Exhibit 25: Shows defendant's requisitions and receipts for the following additional and spare parts equipment furnished to him at his JUNEAU THEATRE, namely:

(Testimony of R. H. Pearsall.)

- 2 239-A Tubes. Y. T. 501150.
- 1 Det. 1-A ESO 318880 Film Tension Pad & Light Gate Assembly, Complete.
- 1 Bronzoid Plaque.
- 1 239-A Tube (Low emission, -used 20 hrs.) Y. T. 501133.
- 1 2-A Photoelectric Cell (Low, new not used) Y. T. 501148.
- 1 239-A Tube. Y. E. 500245.
- 6 ERPI 52 Battery Log Cards.
- 2 T-7 12 v. Candelabra Base, Horn Pilot Lamps.
- 2 KS-6243 Exciting Lamps (Del'd by Engr.) 10-24-29.
- 3 239-A Tubes Y. T. 500233 (Del'd by Engr.) New—elements bent.
- 1 239-A Tube Y. T. 500238 (“ “ “) Low, 44 hrs.
- 2 239-A Tubes, Y. T. 500234. Low emission, used 88 hours.
- 1 Gal. KS-2245 Oil.
- 1 MIF 16" Connecting Cord for 4-A Reproducer Arm.
- 2 KS-6243 Lamps (Del. by Ser. Engr.)
- 1 Reg. Var. Snapswitch for 708-A Cabinet.
- 1 P-211823 Coupling Glange (Del. by Ser. Engr.)
- 2# Mobile Grease.

(Testimony of R. H. Pearsall.)

- 10' PEC Green Flex Lead Wire.
 - 20 6 Amp. #1106 Cartridge Fuses.
 - 4 P-221124 Upper Film Guide Rollers.
 - 1 10 meg. Grid Leak.
 - 2 .5 Meg. Grid Leaks.
 - 1 TA-7049 Fabric Coupling Assembly.
 - 10 EMT-1 Midget Arkless Fuses 1 Amp.
 - 2 Lead Battery Straps $12\frac{5}{8}'' \times 3\frac{3}{4}'' \times 1\frac{1}{8}''$.
 - 8 "A" Battery Nuts & Bolts.
 - 2 $\frac{1}{2}''$ Crouse Hinds Brass Ground Rushings—
Not supplied at installation.
 - 6 KS-6243 Lamps.
 - 1 Det. 4 ES)-3/8335 Hard Green Felt
Washers.
 - 2 Pcs. 4"x6" of $\frac{1}{4}''$ # Crepe Rubber.
 - 2 MID Cords.
 - 2 Det. 4 ESO 318335 Felt Packing Washers.
- [211]
- 10 4302 2 amp. Plug Fuses.
 - 1 TA-7049 Coupling.
 - 6 KS-6243 Exciting lamps.
 - 2 239-A Tubes.
 - 1 2-A Photo Electric Cell.
 - 6 KS-6243 Exciting lamps.

Plaintiff's Exhibit 26: Shows defendant's requisitions and receipts for the following additional and spare parts equipment furnished to him at his KETCHIKAN THEATRE, namely:

(Testimony of R. H. Pearsall.)

- 1 Det. 1-A ESO 318880 Film Tension Pad & Light Gate Assembly, Complete.
- 1 11-A Connecting Block. Y. T. 500227.
- 1 239-A Tube (Del'd 10-24-29) Y. T. 500236.
- 1 205-D Tube. Y. T. 500237.
- 6 ERPI 52 Battery Log Cards.
- 1 KS-6243 Exciting Lamp (Del'd 10-24-29).
- 1 P-211826 Rubber Connector (" " ")
- 1 239-A Tube. Y. T. 501018.
- 2 KS-6243 Exciting Lamps.
- 1 1-A Aperture Y. T. 500232 Mask handle broken, used 375 hours.
- 1 555-W Receiver. Y. T. 500231. Speech coil shorted, used 750 hrs.
- 6 KS-6243 Lamps (Del'd 2-28-30).
- 3 Det. 8 KSO 318880 Film Guide Rollers. Y. T. 527737 (Del'd 2-28-30).
- 1 Det. 1-A Pressure Pad Assembly. Y. T. 527739.
- 1 239-A Tube. Y. T. 527739 (Del'd 2-28-30).
- 2# Mobile Grease.
- 2 P-211823 Coupling Flanges (1) del. by Ser. Engr.
- 2 KS-6243 Exciting Lamps Del. by Serv. Engr.
- 1 2-A Photoelectric Cell. Y. T. 527934.
- 2 D-91179 Conversion Parts.
- 1 KS-6243 Lamp (O-Hours) (Y. T. 527510).
- 6 KS-6243 Lamps.

(Testimony of R. H. Pearsall.)

- 2 D-91179 Conversion Parts.
- 2 KS-6684 Rheostats.
- 1 KS-6243 Lamp (O Hours) Y. T. 527510.
- 2 Crouse Hinds Ground Bushings #251.
- 6 KS-6243 Lamps.
- 2# Mobilgrease.
- 1 TA-7049 Couplings.
- 2 D-91179 Conversion Parts.
- 2 Det. 4 ESO-318335 Felt Washer for 712-A Drive.
- 6 KS-6243 Lamps.
- 10 EMT-1 Midget Arkless Fuses.
- 10 4303 3 Amp. Plug Fuses.
- 2 Det. 8 ESO-318335 Special Gears for 712-A Drive.
- 3 239-A Vacuum Tubes.
- 10 10 Amp. Plug Fuses.
- 10 15 Amp. Plug Fuses. [212]

PLAINTIFF'S EXHIBIT #27.

shows the following list of free replacements:

Order dated 2/25/30 shipped to Coliseum Theatre, Juneau, receipted by Chas. Tuckett, viz:

- 1 MID 16" Cord 29-A to connecting block
- 1 #1612 H&H Switch for 708A control box (on & off)

Suggest free replacement be made on cord as it was used to make emergency replacement of defective PEC lead.

(Testimony of R. H. Pearsall.)

Order dated 8/22/29 shipped to Coliseum Theatre, Ketchikan, receipted by L. C. Lemieux, viz:

- 1 KS-6243 Exciting Lamp No chg.
- 2 239-A Tubes No chg.
- 2 205-D Tubes No chg.

Above to replace defective tubes.

- 2 Gals. KS-2245 Oil Full Price

Order dated 8/24/29 shipped to Coliseum Theatre, Juneau, receipted by W. D. Gross, Manager, viz:

- 2 239-A Tubes No chg.
- 3 239-A Tubes Full Price
- 1 2-A P.E. Cell No chg.

Above required to complete spare parts.

- 1 Pound can Mobiloil "CC" Full Price
- 1½ Gals. KS-2245 Oil Full Price
- ½ (½ Gal. rec'd 8/24/29)
- 1 Grid leak .5 meg. No chg.

Order dated 6/20/29 shipped to Coliseum Theatre, Juneau:

- 6 29-A Connecting block
- Per inst. P.M.W.

Order dated 2/22/30 shipped to Coliseum Theatre, Juneau, receipted by Chas. Tuckett, viz:

- 4 239-A Vacuum Tubes (all under 100 hrs)
- Classification Charge
- 20-095

Order dated 7/16/30 shipped to Coliseum Theatre, Juneau, receipted by J. S. Briggs, viz:

(Testimony of R. H. Pearsall.)

2 D-89833 Conversion Parts for 711-A	
Drives	Classification Charge
	30181

Replaced material to be destroyed in
the field. [213]

Order dated 7/16/30 shipped to Coliseum Theatre,
Ketchikan, receipted by J. S. Briggs, viz:

2 D-89833 Conversion Parts for 711-A	
Drives	Classification Charge
	30181

Replaced material to be destroyed	
in the field	free repl.

Order dated 11/19/29 shipped to Coliseum Theatre,
Juneau, receipted by Chas. Tuckett, viz:

1 239-A Tube (Low emission, used	
50 hours)	free
1 239-A Tube (Low emission, used	
80 hours)	free

Shipping order dated 6/17/29 shipped to Coli-
seum Theatre, Ketchikan, receipted by L. C. Le-
mieux, viz:

1 205-D Vacuum Tube	
2 3/8" Lead Plated Sherman Lugs	

Shipping order dated 4/9/30 shipped to Coliseum
Theatre, Juneau, viz:

4 P-221124 Upper Film Guide Rollers	
-------------------------------------	--

(Testimony of R. H. Pearsall.)

Shipping order dated 6/7/30 shipped to Coliseum Theatre Juneau, viz:

- 10 EMT-1 Midget Arkless Fuses 1 Amp.
- 2 Lead Battery Straps 12-5/8" x 3/4" x 1/8"
- 8 "A" Battery Nuts and Bolts
- 2 1/2" Crouse Hinds Brass Ground Bushings
Not supplied at installation.

Shipping order dated 6/17/30 shipped to Coliseum Theatre, Juneau, viz:

- 6 KS-6243 Lamps
- 1 Det. 4 ESO-318335 Hard Green Felt
Washers

Shipping order dated 9/6/30, Back Order, shipped to Coliseum Theatre, Juneau, viz:

- 1 P-97196 Screws (700-Apparatus Unit)
- 1 P-97084 Switch Arm (700-A Apparatus
Unit)

Shipping order dated 9/6/30 shipped to Coliseum Theatre, Juneau, viz:

- 2 pcs. 4" x 6" of 1/4" Crepe Rubber
- 2 M-1-D Cords, 16"
- 2 Det. 4, ESO 318335 Felt Packing
Washers

- 10 4302—2 Amp. Plug Fuses
- 1 TA-7049 Coupling

Shipping order dated 5/8/30 shipped to Coliseum Theatre, Ketchikan, viz: [214]

- 2 Crouse Hinds Ground Bushings #251
- 2# Mobilgrease
- 1 TA-7049 Couplings

Shipping order dated 5/8/30, Back Order, shipped to Coliseum Theatre, Ketchikan, viz:

- 1 KS-6243 Lamp (O-Hours (Y. T. 527510)
- 6 KS-6243 Lamps

Shipping order dated 6/2/30, Back Order, shipped to Coliseum Theatre, Ketchikan, viz:

- 2 Det. 8 ESO 318335 Special Gears
for 712-A Drive

Shipping order dated 6/2/30, shipped to Coliseum Theatre, Ketchikan, viz:

- 2 Det. 4 ESO-318335 Felt Washer for
712-A Drive
- 6 KS-6243 Lamps
- 10 EMT-1 Midget Arkless Fuses
- 10 4303 3 Amp. Plug Fuses

Shipping order dated 5/8/30, Back Order, shipped to Coliseum Theatre, Ketchikan, viz:

- 2 D-91179 Conversion Parts

Order dated 10/28/29, shipped to Coliseum Theatre, Ketchikan, viz:

- 2 4-B Apertures free
Replacing 2 Det. 1-A ESO-321066 slit assemblies in use 6 months and to be returned for re-adjustment. [215]

Thereupon certified copies of the United States Marshal's returns of service of the writ of replevin

(Testimony of R. H. Pearsall.)

for the equipments in controversy were received in evidence, marked

PLAINTIFF'S EXHIBIT No. 28,

which reads as follows:

[Title of Court and Cause.]

RETURN ON AFFIDAVIT FOR DELIVERY
OF PERSONAL PROPERTY

United States of America,
Territory of Alaska,
Division Number One—ss.

I, ALBERT WHITE, United States Marshal for the First Judicial Division of the Territory of Alaska, hereby certify that on April 20, 1931, I received the within affidavit for delivery of personal property, together with plaintiff's written endorsement thereon, requiring me to take possession of the hereinafter described personal property from the defendant W. D. Gross and to deliver it to the plaintiff Electrical Research Products, Inc., a corporation, together with the plaintiff's written undertaking in favor of the defendant, in the sum of \$13,200.00, double the value of the hereinafter described personal property, and that thereafter and on said day I duly approved said undertaking, and that thereafter and on the 28th day of April, 1931, I duly served upon the defendant W. D. Gross, in Ketchikan, Alaska, the said affidavit, together with said written endorsement thereon and

(Testimony of R. H. Pearsall.)

said undertaking by then and there delivering to F. L. Stannard, personally and in person, who was then the agent of said W. D. Gross and from whose possession said hereinafter described personal property was thereafter taken, the said W. D. Gross not being then in Ketchikan and I being unable to find him therein, copies of said affidavit, written endorsement thereon, and said undertaking, all of which were certified by R. E. Robertson, plaintiff's attorney, and that I thereupon took into my possession from said Stannard, the aforesaid agent of said defendant W. D. Gross, the following described personal property, to-wit:

That certain equipment more particularly designated as "Type 2-S equipment designed for use with two simplex projectors for film and disc reproduction" for the electrical reproduction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, all of which was then situated in the Coliseum Theatre in Ketchikan, Alaska.

That thereafter I retained said personal property in my possession for more than three days, and that the defendant did not within said three days after the service of the copies of said affidavit and undertaking upon him, or at all, give notice to me that he excepted to the sufficiency of the sureties on said undertakings, nor did said defendant, with-

(Testimony of R. H. Pearsall.)

in said three days, or at all, require the return of said personal property to him, and that thereafter and on the 4th day of May, 1931, I duly delivered the aforesaid personal property to the plaintiff.

Dated at Ketchikan, Alaska, this 4th day of May, 1931.

ALBERT WHITE,
United States Marshal
(Signed) By WM. H. CASWELL
Office Deputy

Costs paid by plaintiff:

Service of Writ	\$ 3.00
Mileage .....	.10
Hauling	12.00
Storage	2.00

[216]

[Title of Court and Cause.]

RETURN ON AFFIDAVIT FOR DELIVERY
OF PERSONAL PROPERTY

United States of America,
Territory of Alaska,
Division Number One—ss.

I, ALBERT WHITE, United States Marshal for the First Judicial Division of the Territory of Alaska, hereby certify that on April 20, 1931, I received the within affidavit for delivery of personal property, together with plaintiff's written endorsement thereon, requiring me to take possession of the hereinafter described personal property from

(Testimony of R. H. Pearsall.)

the defendant W. D. Gross and to deliver it to the plaintiff Electrical Research Products, Inc., a corporation, together with the plaintiff's written undertaking in favor of the defendant, in the sum of \$13,200.00, double the value of the hereinafter described personal property, and that thereafter and on said day I duly approved said undertaking, and that thereafter and on the 20th day of April, 1931, I duly served upon the defendant W. D. Gross, in Juneau, Alaska, the said affidavit, together with said written endorsement thereon, and said undertaking by then and there delivering to said W. D. Gross, personally and in person, copies of said affidavit, written endorsement thereon, and said undertaking, all of which were certified by R. E. Robertson, plaintiff's attorney, and that I thereupon took into my possession from said W. D. Gross the following described personal property, to-wit:

That certain equipment more particularly designated as "Type 2-S equipment designed for use with two simplex projectors for film and disc reproduction" for the electrical reproduction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, all of which was then situated in the Coliseum Theater in Juneau, Alaska.

That thereafter I retained said personal property in my possession for more than three days, and that

(Testimony of R. H. Pearsall.)

the defendant did not within said three days after the service of the copies of said affidavit and undertaking upon him, or at all, give notice to me that he excepted to the sufficiency of the sureties on said undertaking, nor did said defendant, within said three days, or at all, require the return of said personal property to him, and that thereafter and on the 9th day of May, 1931, I duly delivered the aforesaid personal property to the plaintiff.

Dated at Juneau, Alaska, this 22nd day of May, 1931.

ALBERT WHITE,
United States Marshal,
(Signed) By DONALD E. MARTIN
Office Deputy.

Costs paid by plaintiff:

Service of Writ	\$ 3.00	
Mileage .....	.10	
Hauling	7.00	
Storage	—	
Watchman	5.00	[217]

Thereupon, in response to plaintiff's motion, defendant withdrew his third and sixth affirmative defenses; but plaintiff's further motion also then made, namely: that defendant be required before going to proof to elect as to whether or not he sought to recover damages for alleged loss of good will or damages for alleged loss of profits under his first and third counterclaims, was overruled, to which ruling plaintiff then excepted. [218]

DEFENDANT'S CASE IN CHIEF

I. GOLDSTEIN

I. Goldstein, defendant's witness, being first duly sworn, testified:

Direct Examination

I am Mayor at this time and also in business; I have lived in Juneau for forty-five years; I am familiar with the Coliseum Theatre, having attended shows there off and on ever since it was running, prior to April 20, 1931.

Thereupon witness Goldstein was asked by defendant:

“Did you notice any difference in the sound and the pictures shown there after—between the period immediately following April 20, 1931, and the year preceding that date?”

Thereupon plaintiff objected to the question and to the entire line of testimony upon the ground that it was incompetent, irrelevant, and immaterial, no foundation laid, and no proper qualification of the witness, which objection was overruled, to which ruling plaintiff then excepted.

Thereupon the following further proceedings were had:

A. I did.

Q. What was the difference between the sound and pictures prior to April 20, 1931, and after?

A. I couldn't exactly state the exact dates but when there was a change made in the ma-

(Testimony of I. Goldstein.)

chines down there there was no comparison in the sound.

Q. Was it better or worse afterwards?

A. It was much worse.

Cross Examination

Thereupon Witness Goldstein further testified: I couldn't tell either the last date before April 20, 1931, or the first date after April 21, 1931, that I attended the Coliseum Theatre. [219]

W: D. GROSS

Defendant Gross, on his own behalf, being first duly sworn, testified:

Direct Examination.

I live in Juneau, I am now and have been engaged in the moving picture business for thirty-three years and in Juneau since 1910 and in Ketchikan since 1908 where I built the present Coliseum theatre in 1924: I bought the property and rebuilt the Juneau Coliseum theatre in about 1912; I signed plaintiff's exhibit 1 around February, 1929, at which time it had not been signed by plaintiff, and sent it to plaintiff's main offices; I received my copy, signed by plaintiff, some time in April, 1929, in Juneau by mail; meanwhile I had seen plaintiff's representative Gage in Seattle and he told me "that the contract was accepted, with the provision to leave open the clause that had service charges."

(Testimony of W. D. Gross.)

Thereupon defendant's counsel propounded the question "Did he say 'leave open' or 'leave out'?" to which defendant then answered, "'leave out'".

Thereupon defendant further testified: Plaintiff's Seattle agent representative, Gage, told me I would have to look for my own service man; I waited in Seattle for Taylor, plaintiff's installation man and engineer, and left Seattle on the same boat with him; I tried to get a service man but in them days you couldn't get any; I talked to Taylor, told him that we have good reliable men who have been growing up in the business, if he would instruct my men in starting when the equipment goes in, work from the bottom up and show them all the details in case it breaks down, they would be able to take care of it themselves; Taylor and I arrived in Juneau the latter part of April and found my contracts here waiting for me; I introduced Taylor to Charles Tuckett, then Manager of my Juneau theatre, and to Louis Lemieux, first operator in my Juneau theatre but afterwards manager for my Ketchikan theatre; Tuckett and Lemieux helped Taylor and they [220] worked together for a couple weeks; Taylor had a book explaining all the details in case anything goes wrong with the equipment so that they would be able to take care of it; these men got some books from Richardson, New York, but I don't know what they did about studying them; I increased the pay of these men from \$150.00 to \$250.00; the equipment in Juneau was installed May 20, 1929, and in Ketchikan about the middle of

(Testimony of W. D. Gross.)

June, 1929; I met plaintiff's Witness Wilcox in Juneau in July, 1929, and Taylor brought him into my office and represented him as an official of the company and supervisor over installation and service and we had a conversation in the operating booth at which Louis Lemieux was present, to whom I introduced Wilcox; Wilcox asked Louis Lemieux "How is the sound?" and also asked Taylor if everything was O. K., and Taylor says the machines are running for the last two weeks now and thinks he will be able to go back to Seattle, and he asked Wilcox to go to Seattle, and Wilcox permitted him to go back to Seattle, "as Mr. Gross has no service with us in Alaska." I don't think I could give the conversation any more fully; Taylor wanted to go back to Seattle because he wanted to be more athletic and Wilcox told him he could go on the first boat "as Mr. Gross has no service with us". Taylor and Wilcox both left right after that, and I run the theatre right along then; that is my signature on plaintiff's exhibit No. 7-A; I don't recollect seeing Albright at that time; he came into the office and handed me this to sign some time the last part of August; I don't remember Knowlton or any of them; I was in Juneau very little of the time; plaintiff's service engineers might have been here without my knowing it; I left Juneau some time in September, 1929, and hadn't heard anything about service charges or received any bill for service

(Testimony of W. D. Gross.)

charges before I left; the first time I heard anything about a claim for service charges was Tuckett wired me in the East some time in October, 1929; I then left for Chicago because I figured [221] to see Wilcox on account of his statement to me and Lemieux that I don't have service, but I didn't see him; I talked to some man, I don't know who he was, about service, and learned from him to go to Seattle and to take up the matter with Gage; I went to New York but I didn't go see plaintiff; I returned by way of Los Angeles to Seattle and arrived in Seattle some time in December, 1929; I never saw plaintiff's exhibits 2 and 4 until I reached Seattle; I saw it in Gage's office; I had not received the mail Tuckett had forwarded me; I had been traveling about too much; I called to see Gage right away in regard to these service charges.

Whereupon the following proceedings took place:

“Q. When you came into Mr. Gage's office, and after you met him and talked to him, knew him,—what, if anything, did you say with reference to service?”

“Mr. ROBERTSON: If the court please, the plaintiff now objects as incompetent, irrelevant and immaterial, to the reception of any evidence on behalf of the defendant that is calculated or intended to prove that the defendant signed the plaintiff's exhibits ‘2’ and ‘4’ under duress, upon the ground, if the court please—
* * * that neither in the first or fourth

(Testimony of W. D. Gross.)

affirmative defenses or in the second and fourth counter-claims are sufficient facts stated to constitute legal duress.”

“The COURT: The motion, as a whole, will be denied.

“Mr. ROBERTSON: Take an exception.

“The COURT: Allowed.

“Mr. ROBERTSON: I wonder if it may be understood that I object to all evidence introduced in the case, produced by the defendant either through Mr. Gross or any other witness or documents produced for the purpose of supporting the charge of duress made in the first and fourth affirmative defenses and in the second and fourth counter-claims, and have an exception to it without having to make the objection each time?

“The COURT: Yes. Let the record so show.”

Thereupon Witness Gross further testified: I asked him “What is the idea of charging me for service when I never signed up for service.” He claimed he can’t help himself, plaintiff is writing him right along and he has to write me at same time; we talked quite a little; I can’t remember exactly all that he said; he has to get the money or they are going to pull out all the [222] machines; Gage said he received a letter from plaintiff they wanted me to sign it to make it a part of the con-

(Testimony of W. D. Gross.)

tract and he gave me those letters, plaintiff's exhibits Nos. 2 and 4, to sign; if I don't sign he threatened to take the machines out, same thing as if a person has a telephone and doesn't pay for the telephone, the telephone system would disconnect him; he spoke about paying back service charges; I told him I didn't owe service charge, didn't see why I should pay a service charge from the day I got the machines, and he said that is what the company wants, and he would take the machines out if I didn't pay; if I don't pay the money he would notify his attorney to pull out both machines at Juneau and Ketchikan and if I didn't sign the contracts; I then signed the contracts and paid him the money.

Whereupon the following proceedings were had:

Q. At that time, Mr. Gross what was the condition of your business, in Juneau and Ketchikan? How would your business in Juneau and Ketchikan be affected by taking out those machines?

A. I would say they would destroy the business if they took out those machines.

Q. In both places?

A. Yes.

Q. Did you know what your rights were under the contract at that time—whether he had a right to take them out or not?

A. I presume I did—I understood that they could do that.

(Testimony of W. D. Gross.)

Q. You understood he could take them out?

A. Yes.

Q. Did Gage tell you anything about that?

A. Yes.

Q. What was it?

A. He said if I didn't pay the money and sign the contract [223] he would tear the machines out.

Q. Did he tell you anything about his power to do it?

A. He said he had power to do it.

Q. Did you know whether he had power to do it?

A. Yes I did, he did have power to do it.

Q. You believed he had power?

A. I believed he did.

Q. Did you know anything about the law?

A. Not at that time, I don't know much about the law.

Q. Did you believe he had the power to do it?

A. Yes sir.

Whereupon defendant Gross further testified: I owed plaintiff for five months that we hadn't paid yet but I didn't owe him anything that was due at that time; I had done everything the contract called for; there was still five months unpaid but the payments had been kept up right along; I didn't owe them anything on the Juneau contract of March

(Testimony of W. D. Gross.)

28, 1929, nor the Ketchikan contract of March 28, 1929, but had paid everything due under them to that time; I performed everything required of me under those contracts; when I signed the application for those contracts I paid \$1,130.00 on deposit; these payments that fell due were made in twelve payable notes that are described in the contract and at that time I had paid seven of them and interest also; I believed Gage had the power and would take the machines out.

Thereupon the following proceedings took place:

“Q. Was there anything that lead you to sign those contracts except the threats of Mr. Gage?

A. Yes sir.

Q. ‘Yes sir’ or ‘No sir’?

A. No sir.

Q. What do you mean—‘yes’ or ‘no’?

A. I didn’t catch that right. [224]

Q. You ought to get the question before you answer it. Was there anything that lead you to sign those contracts except the threats of Mr. Gage;—in other words, would you have signed the contracts except for the threats of Mr. Gage?

Mr. ROBERTSON: That is leading if the Court please; object.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

A. No.’

(Testimony of W. D. Gross.)

Thereupon Witness Gross further testified: I never saw Anderson, the man whose deposition has been read in this case; I can't recollect whether I ever wrote him or not; Gage never told me who Anderson was; after the contracts had been signed by me and the money paid to Gage, the latter told me he was going to try to persuade the company to put a man in Juneau and one in Ketchikan to take care of my service but they never did; I personally paid \$500.00 for service charges in April, 1930, to Gage; I was in Seattle at that time and Gage called me up on the 'phone and when I got there they told me I owed them \$500.00; he was going to have two men stationed one in Juneau and one in Ketchikan; they told me this way—if I don't pay the service charges right now when I sign them letters—you know what is going to happen to me; I said "What is going to happen to me?" they said, "When a chicken don't lay eggs you know what happens to her, they cut her head off and that is what we are going to do to you if you don't pay up", and I had to pay the money then; I couldn't get talking machines at that time; there was only one other outfit that sold talking machines at that time and you couldn't be sure that they would talk or not, and no other place you could get a good machine; no other talking machines were available in December, 1929, when I signed plaintiff's exhibits 2 and 4, or that I could get to take the place of these that had been taken out; I paid Gage that \$500.00 by check which

(Testimony of W. D. Gross.)

I now produce; this is the check and it includes service and some merchandise.

Whereupon the following proceedings were had:

[225]

“Mr. HELLENTHAL: I offer it in evidence.

Mr. ROBERTSON: I have a general objection as to all this line of testimony, so I wouldn't like to consent to it.

Mr. HELLENTHAL: Offer it in evidence as Exhibit 'E'.

The COURT: It may be received.”

Whereupon check was received in evidence and marked defendant's exhibit E, and reads as follows:

“EXHIBIT E.

Juneau, Alaska, April 2, 1930.

PAY TO THE ORDER OF

Electrical Research Products Inc.....\$538.00
 Five hundred thirty eight and 00/100 DOLLARS
 TO: THE B. M. BEHREND'S BANK

Juneau, Alaska

Coliseum Theatre
 by W. D. Gross, Manager.
 CT

(Testimony of W. D. Gross.)

(endorsed on back as follows:)

Pay To the Order of Security-First National Bank
of Los Angeles

Highland & Hollywood Branch

April 10, 1930

Electrical Research Products, Inc.

Acoustic Department

Account No. 1''

Thereupon Witness Gross further testified: The check of \$538.00 is for service and also merchandise; I have no idea whether \$62.00 of it is for merchandise or not; I don't know what part is for merchandise and what part for service; I never paid any service at all after that, I never directed the payment of any service by anybody else among my employees; so far as I know no service was paid after that.

Whereupon two checks, offered in evidence by defendant, were received, and marked, respectively, defendant's exhibits F-1 and F-2, and read as follows: [226]

(Testimony of W. D. Gross.)

"EXHIBIT F-1

Juneau Alaska Service

(Juneau)

Juneau, Alaska, Dec. 30, 1929.

Pay to the Order of

Electrical Research Products Inc. \$1019.00

One Thousand Nineteen and 00/100.....Dollars

To THE B. M. BEHREND'S BANK

Juneau, Alaska

COLISEUM THEATRE, JUNEAU

(Signed) W. D. GROSS, Manager."

"EXHIBIT F-2

Ketchikan Alaska Service

(Ketchikan)

Juneau, Alaska, Dec. 30, 1929.

Pay to the Order of

Electrical Research Products Inc. \$960.00

Nine Hundred Sixty and 00/100.....Dollars

To THE B. M. BEHREND'S BANK

Juneau, Alaska

COLISEUM THEATRE, JUNEAU

(Signed) W. D. GROSS, Manager."

Thereupon Defendant Gross further testified: Those checks, defendant's exhibits F-1 and F-2 were paid by me at the time I signed the papers; Gage

(Testimony of W. D. Gross.)

filled them out and I signed them in his office; they are for service and also for merchandise; this letter, defendant's exhibit F-3 for identification was written by [227] me to Gage; I dictated it, it was written by Charles Tuckett, when I arrived in Juneau from Seattle after I paid them the \$2,000.00; I never received a reply to it.

Whereupon the following proceedings took place:

“Mr. HELLENTHAL: I offer this letter in evidence.

Mr. ROBERTSON: We have the same objection, the same objection to all this line of testimony; to this letter.

The COURT: It may be received.”

Thereupon defendant's letter to Gage, dated February 10, 1930, was received in evidence, marked

DEFENDANT'S EXHIBIT F-3,

and reads as follows:

“Feb. 10, 1930.

Mr. Gage,
Electrical Research Products Inc.,
Seattle, Wash.

Dear Friend Gage:

I arrived in Juneau today and my manager is complaining about the service that you have been giving us up here on your Western Electric system.

I paid you while in Seattle, something like \$2000.00 for back service. I can say that I am awful sorry now that I have done this and also that I

(Testimony of W. D. Gross.)

signed the contract for service as the men you have sent up here have done more harm than they have done good.

After keeping the machines for several months with my own men taking care of them. They gave us no trouble and perfect service. But after I decided on service and service was given they have been on the bum and in fact are still on the bum.

It seems to me that I have men operating in the booth who seem to know more about your equipment than you so called service men or rather electrical engineers. And still we have no right to look over our equipment. You send a man up here just out of school and who don't know what it is all about.

For the last two months we have had one man up here and he gave about 30 minutes service to the machines and put it on the bum because since that time everything has happened.

To days we have plenty of trouble on our Movietone and also your tubes do not hold up to the standard. They must be old tubes or damaged ones, I don't know which.

Everything from the first that has had to be fixed on this equipment has been done by my men. And most of the time without any help from your office. There is not one thing that has happened to these machines that we have not had to fix ourselves as your service men were too late or they did not come at all in fact we can name one thing that your

(Testimony of W. D. Gross.)

service man, one of them could not fix and my man fixed it. [228]

Also we have been promised and they have been recommended, new lenses for the Movietone. But to date we have failed to receive them or in fact hear anything about them. And more than two months ago we ordered felt pads and they have just arrived.

I want to discontinue my service as since I paid you \$2000.00 your service has been very unsatisfactory and for a matter of fact before this time. In fact my own men are better able to do this service that what your engineers can. As my men have to fix things when they go wrong right then as the show must go on no matter what happens.

When I saw you on the wharf you had a man coming up here. But it seems that he just looked at a few things and left at once for Lathrops towns. He spent about enough time to write out a report and that is all. Thirty minutes would be a long time for him here.

I think I am entitled to a adjustment on this \$2000.00 and also on the last remittance that was made from Juneau as it is just a waste of time for them to come up here to spent 20 or 30 minutes and then go and then my men have to fix things.

I would like a answer to this letter by return mail as I am not at all satisfied with your service.

Very truly yours,

WDG/c

W. D. GROSS."

(Testimony of W. D. Gross.)

Thereupon Defendant Gross further testified: This letter marked defendant's exhibit F-4 for identification, was dictated by me in Juneau and written by Charlie Tuckett, but signed by me and written to Gage and I never received any reply to it.

Whereupon the following proceedings took place:

“Mr. HELLENTHAL: I offer this in evidence.

Mr. ROBERTSON: I think I will also interpose an objection to this, if the Court please, as a self-serving declaration.

Mr. HELLENTHAL: It is a part of the correspondence, Your Honor.

The COURT: It may be admitted.

Mr. ROBERTSON: Exception, if the Court please.”

Thereupon defendant's letter to Gage, dated February 17, 1930 was received in evidence, marked

DEFENDANT'S EXHIBIT F-4,
and reads as follows:

“Juneau, Alaska,
Feb. 17, 1930.

Mr. Gage,

Electrical Research Products, Inc.,
Seattle, Wash. [229]

Dear Mr. Gage:

I received a wire from your office to the effect that your engineer would arrive Juneau, on the twelfth of the month to repair our equipment that we were

(Testimony of W. D. Gross.)

having trouble with. To date your engineer has failed to arrive and according to the boat schedules he will not be able to arrive until about the twenty-fifth. This is twelve days after you notified me that he would be here.

This delay in your man arriving has made it so that I had to have my own man repair your equipment.

My idea Mr. Gage, is that there is no way that we can have service in Alaska that would be satisfactory unless you have a man in each town that you have a equipment. As it is now the boats are so far between in the winter time, that it is over fifteen days before we could even get service here. And it always happens that when we need service there is no boat or your man is some wheres else. This winter everything that has happened we have had to fix. In fact not one of your men have fixed a thing that has gone wrong. All they have done is to look over the equipment and let it go at that. I would rather take chances and if my men could not fix things, I would wire you for a man and would pay his fare expense and salary to Juneau and back.

The \$2,000 I paid you while I was in Seattle, I am now sorry that I did this. RCA has no service man. All the exhibitors that have one of these equipments have to do is to pay off for the machine.

(Testimony of W. D. Gross.)

I do not see why I should have to have a service man and get no service as I can assure you that all the real servicing that has been done has been done by my own men.

You had better notify your New York Office as to my intention on this service charge.

Also if you think that you can put a service man in Juneau, and have him service Fairbanks. I can assure you that this can not be done, as the boats and trains in this country do not run as the trains do outside. It will take sometimes a couple of months to make this trip and sometimes longer than this as you can never tell when a boat is going on the rocks, which they do.

From now on I am going to ignore your service charges unless you have a man in Juneau and one in Ketchikan, and if you do not do this. Then I will call for one from Seattle when I need one and will pay his fare salary and expenses from Seattle.

I am enclosing a bill. And you may make a copy of same and send it to New York.

I have regretted signing that letter the minute after I signed it as your service here in my theatre has been most unsatisfactory, in fact I have received no service when I really needed it. No court will uphold this agreement when the service has been as it have in the past.

My manager notified you on Feb. 3, 1930 that one of the machines were in need of service. Here it is

(Testimony of W. D. Gross.)

the 18th and no man has arrived yet. This is not service I can assure you. [230]

I am awaiting a reply to this letter before I take this matter farther as I am very dissatisfied the way things are and have been going in regards to service.

Very truly yours,

WDG/c

(Signed) W. D. GROSS''

Thereupon Defendant Gross further testified: This letter addressed to Pearsall, San Francisco, marked defendant's exhibit F-5 for identification, was dictated by me, I wrote it, postage was prepaid on it; I never received any reply to it.

Whereupon the following proceedings took place.

Mr. HELLENTHAL: I will now offer this letter in evidence.

Mr. ROBERTSON: We make the additional objection to that, if the Court please, that it is a self-serving declaration.

The COURT: It may be received.

Thereupon defendant's letter to Pearsall, dated March 28, 1930, was received in evidence, marked

DEFENDANT'S EXHIBIT F-5,
and reads as follows:

(Testimony of W. D. Gross.)

“Seattle Washington
March 28, 1930.

Mr. R. H. Pearsall
Electrical Research Products
San Francisco, California.

Gentlemen:

Your wire of March 14th was relayed to Seattle, as you know I have been traveling for several weeks through small towns.

Will state that the service charge, as it now stands, is out for Alaska. Unless we have a man right in the town where the machines are, it is absolutely no use to make any attempt to pay service charges for Western Electric Equipment.

My man wired you at one time that their machine had broken down and to send a repair man. You answered, stating that a man would be sent on the first boat leaving Seattle, but he did not show up for several weeks, and we were without service during that time. We had to run one machine as the first one was out of “whack” and I cannot see where your service is of any use to us or where it does us any good.

My first agreement with the company was to pay for service charges as I needed them, and for any service needed, I was to pay a man a salary and for his ticket up and down.

A man stationed in Juneau could take care of Juneau and Ketchikan. That would be quite a chance as the boats do not run very often, about

(Testimony of W. D. Gross.)

once a week or every ten days. In case the machine in Ketchikan broke down, we would have to [231] wait a week or ten days for a man to come from Juneau, but that would be more help than the present line up for service.

You just received \$2000.00 for service for two men to come up and then go right out again on the next boat.

Hoping you can see I am trying to get away from the present service, and if this thing doesn't come to settlement, I will have to make a settlement on this service charge, which would be the best way to handle it.

You could write me at Seattle, c/o Atwood Hotel. I am going to take this matter up with Mr. Gage, your representative. I wrote him a letter, telling him all about the situation, and I don't know whether he referred the letter to you or not.

Yours very truly,

WDG:h

(Signed) W. D. GROSS''

Thereupon Defendant Gross testified further: I received this letter, defendant's exhibit F-6, for identification, from plaintiff.

Whereupon Mr. N. A. Robinson's letter on behalf of plaintiff to defendant, dated June 11, 1930, was received in evidence, marked

DEFENDANT'S EXHIBIT F-6,

and reads as follows:

(Testimony of W. D. Gross.)

“(Letterhead)

ELECTRICAL RESEARCH PRODUCTS INC.

Subsidiary of

WESTERN ELECTRIC COMPANY

Incorporated

NEW YORK, N. Y.

Western Division Headquarters

7046 Hollywood Boulevard

Los Angeles, California.

June 11, 1930.

Mr. W. D. Gross,
Ketchikan, Alaska.

Dear Mr. Gross:

We have for some time considered arrangements for servicing your theatres at Juneau and Ketchikan, that might better assure you of uninterrupted performances.

We realize that under the present arrangements a serious breakdown in the equipment might mean the loss of several consecutive shows before our engineer could arrive at the scene.

As a means of overcoming this hazard, we are contemplating the employment of a man in each of the towns in Alaska where our equipment is located, to render emergency service. We plan to secure men with the proper technical background, train them in the maintenance of the sound installation, and furnish them with tools, technical data and other equipment nec- [232] essary to insure

(Testimony of W. D. Gross.)

their ability to keep the installation operating properly.

In addition to this service, we intend to send a Technical Inspector to Alaska at intervals of approximately six months with the dual purpose of thoroughly overhauling the sound equipment and to instruct the local service men in the latest developments in sound reproduction. The proposed arrangements would in no way effect the weekly service charge that you are now paying. Any additional expense involved will be absorbed by this Company.

As we would like very much to see these arrangements in effect before the end of the summer, we shall appreciate your early acknowledgment of agreement to the proposals set forth in the foregoing. With best wishes for continued success, I am

Very truly yours,

(Signed) N. A. ROBINSON

Service and Technical Inspection
Superintendent."

NAR:ID

Thereupon defendant Gross further testified: Plaintiff never placed a man in Juneau and Ketchikan as indicated in that letter nor did anything indicated in that letter, nor took any steps toward it; I wrote this letter, defendant's exhibit F-7 for

(Testimony of W. D. Gross.)

identification, to plaintiff regarding service charges and the original letter was placed in the post office, postage prepaid; I never received a reply to it.

Whereupon the following proceedings took place:

“Mr. HELLENTHAL: I now offer that in evidence.

Mr. ROBERTSON: To that also I make the additional objection it is a self-serving declaration.

The COURT: It may be received.”

Thereupon defendant's letter to plaintiff, dated September 15, 1930, was received in evidence, marked

DEFENDANT'S EXHIBIT F-7,

and reads as follows:

(F-7)

“Juneau, Alaska,
September 15, 1930.

Electrical Research Products Inc.

7064 Hollywood Blvd.

Los Angeles, Calif.

Gentlemen: [233]

I notice that the Service Charges have piled up again on our Western Electric equipment.

I will state that it is impossible to pay these Service Charges as we have numerous other expenses to pay and have to keep our theatres running but find it impossible to do so and still pay you Service Charges.

(Testimony of W. D. Gross.)

I feel that I have done more than any one else has done towards the Electrical Research Products Inc. I paid out \$21,000 for the machines and also about \$3,000 for service which I never received value.

I therefore feel that my help can take care of the equipment and if we need any service will wire to Seattle and pay the expenses from Seattle to either Juneau or Ketchikan what ever the case may be. This is the best I can do at present.

I would like to receive a letter from you in regards to your opinion to the Service Charge, as if I have to pay Service Charges for 10 years I would rather install RCA and by using their equipment I wouldn't have to pay any Service Charge.

Please let me know what your intentions are as I will have to prepare for another mechanism.

Yours truly,

WDG/ZG

(Signed) W. D. GROSS"

Thereupon Defendant Gross further testified: This bundle of checks and notes marked defendant's exhibit F-8 for identification, contains all of the original notes and checks given by me in connection with the lease of the equipments in Juneau and Ketchikan.

Whereupon 12 notes, each dated May 10, 1929, each for \$656.25, each drawn on the B. M. Behrends Bank, Juneau, and becoming due at monthly inter-

(Testimony of W. D. Gross.)

vals, and also 12 notes each dated June 8, 1929, each for \$656.25, each drawn on the Miners & Merchants Bank, Ketchikan, becoming due at monthly intervals, of all of which notes defendant is maker and plaintiff is payee, and all of which notes, as they became due, were paid on the original contracts of March 28, 1929, and of which notes, except as to dates and name of respective bank, the following is a copy: [234]

“ New York, N. Y. 5/10/29

On January 10, 1930 I/WE promise to pay to the order of ELECTRICAL RESEARCH PRODUCTS, INC. Six Hundred Fifty Six and 25/100
.....Dollars with interest at the rate of six

100

percent (6%) per annum from 5/10/1929 Payable at B. M. BEHREND'S BANK, JUNEAU, ALASKA. The Chase Natl. Bank of The City of New York — 53166 — Collections.

Value Received

This note is one of a series of 12 notes totalling in the aggregate the sum of \$7,875.00 and in the event that any of the notes in said series is not paid us and when the same becomes due all of the said notes shall forthwith become due and payable.”

W. D. GROSS, Individual

(Signed) W. D. GROSS

together with said Banks' memoranda of payments thereof, and also three checks in form as follows:

(Testimony of W. D. Gross.)

“The B. M. Behrends Bank,
Juneau, Alaska.

Juneau, Alaska, July 28, 1928.

Pay to the Order of Electrical Research Products,
Inc., One Thousand thirty dollars (\$1130.00)

Coliseum Theatre, Juneau
W. D. GROSS, Manager.”

“The B. M. Behrends Bank,
Juneau, Alaska.

Ketchikan, Alaska, July 28, 1928.

Pay to the Order of Electrical Research Products,
Inc., One Thousand thirty dollars (\$1130.00)

Coliseum Theatre, Ketchikan
W. D. GROSS, Manager.”

“The Miners & Merchants Bank,
Ketchikan, Alaska.

Ketchikan, Alaska, June 5, 1929.

Pay to the Order of Electrical Research Products,
Inc., One thousand four hundred ninety five dollars
(\$1495.00)

Coliseum Theatre, Ketchikan
W. D. GROSS, Manager.”

were offered in evidence by defendant, to which plaintiff objected [235] upon the ground that they were incompetent, irrelevant and immaterial and that neither defendant's first or fourth affirmative defenses, nor his second and fourth counterclaims state facts sufficient to constitute legal duress;

(Testimony of W. D. Gross.)

which objection by the Court was overruled, to which ruling plaintiff then excepted, and said notes, memoranda and checks were received in evidence and marked

DEFENDANT'S EXHIBIT F-8.

Thereupon defendant Gross further testified: There has never been any regular airplane service between Juneau and Ketchikan and the only planes flown between those cities have been private planes; I received quite a few dunning letters from plaintiff relative to these service charges; plaintiff's attorney Robertson wrote letters making demand upon me for payment of them before the replevin suit was brought and he wrote me this letter of February 7, 1931; I never paid him anything on the strength of it.

Whereupon Robertson's letter to Gross, dated February 7, 1931, was received in evidence subject to plaintiff's same general objection, marked

DEFENDANT'S EXHIBIT F-9,

and reads as follows:

(Testimony of W. D. Gross.)

EXHIBIT F-9

“R. E. ROBERTSON

Attorney-at-Law

200 Seward Building

Juneau, Alaska

February 7, 1931.

Mr. W. D. Gross,

Coliseum Theatre,

Juneau, Alaska.

Dear Sir:

Re: Electrical Research Products, Inc.

Referring to your Mr. Tuckett's conversation with me on January 10th last in which he claimed that \$500.00 had been paid on the above account on or about November 1st last, and his promise to pay a further \$500.00 on account during the week commencing January 11th last, and also Mr. Tuckett's subsequent statement on January 19th that on that day he was sending a check to you in Seattle in the sum of \$1314.11, for you to sign so that it could be paid on these accounts:

No payment so far has been made on these [236] accounts, and I am informed that the correct amounts of the accounts are as follows:

Coliseum Theatre, Juneau, Alaska,	
through December 13th, 1930.....	\$890.00
Coliseum Theatre, Ketchikan, Alaska,	
through December 13, 1930.....	924.02

In addition to the above amounts there is also a weekly service charge of \$29.75 at each theatre from

(Testimony of W. D. Gross.)

December 13, 1930, to this date, or a further charge of \$238.00 at each theatre. This service charge is made in accordance with the letter of September 4, 1929, which Mr. Gross accepted and of which I have now been furnished a copy.

The total amount in which you are now delinquent therefore, is \$2290.11. Demand is made upon you for the immediate payment thereof and unless so paid on or before two o'clock, February 9, 1931, suit will be promptly instituted to enforce payment thereof.

I am enclosing a copy of this letter to Mr. Tuckett so that he may be advised thereof; inasmuch as he has previously come to see me on your behalf in relation to these accounts.

Yours very truly,

(Signed) R. E. ROBERTSON

RER:H

CC to Mr. Tuckett."

Whereupon the following proceedings were had:

“Q. What, if anything did he (Mr. Robertson) do in the way of bringing suit against you?

A. He filed suit for the amount of money he wanted to recover.

Q. What else did he do?

A. He brought suit.

Mr. ROBERTSON: If this is an attempt to bring in any issues in the attachment suit I

(Testimony of W. D. Gross.)

object as incompetent, irrelevant and immaterial. The attachment suit is not at issue in this case under the pleadings or otherwise.

The COURT: I don't know the purpose. Read the question (Question read.)

Q. If anything, what else did he do in relation to this matter of collecting service charges?

A. He filed suit against me and I put up a bond.

Mr. ROBERTSON: Object as not responsive.

The COURT: It is part of the answer.

Q. What else did he do in connection with filing that suit?

A. He replevined the machines the next day.

Q. Did he attach anything? [237]

A. Yes, he attached the box office.

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial and not within the issues of this suit. There is no allegation that anything in the attachment suit was wrongful.

The COURT: The jury will be instructed at this time that the defendant in this case doesn't claim anything by reason of anything that grew out of the attachment. That has nothing to do with this particular suit.

Mr. ROBERTSON: Exception.

(Testimony of W. D. Gross.)

Q. Mr. Gross, what happened, if anything?

A. Mr. Robertson attached the box office in Juneau and also in Ketchikan, before he filed suit, before he brought the papers in.

Q. He attached your box office in those places?

A. Yes.

Q. What, if anything, did you do?

A. I went to see Si Hellenthal and told him about it.

Mr. ROBERTSON: We make the same objection about that.

The COURT: It may be received on the same basis.

Mr. ROBERTSON: Exception.

A. I released the attachment by putting a bond up.

Q. By putting up a bond?

A. Yes sir."

Thereupon defendant Gross further testified: Robertson wrote me this letter of March 26, 1931, which I received about the same date as the letter is dated.

Whereupon Robertson's letter to defendant, dated March 26, 1931, was received in evidence, subject to plaintiff's same general objection, marked

DEFENDANT'S EXHIBIT F-10,

and reads as follows:

(Testimony of *W. D. Gross.*)

“Exhibit F-10

R. E. Robertson
Attorney-at-Law
200 Seward Building
Juneau, Alaska

March 26, 1931.

Mr. *W. D. Gross,*
Juneau, Alaska.

Dear Sir:

[238]

On account of your failure to comply with the terms of that certain written contract entered into on March 28, 1929, between you and the Electrical Research Products, Inc., and subsequently mutually modified on or about September 4, 1929, in respect to that company's granting you a non-exclusive, non-assignable license to use in your theater at Juneau, Alaska, certain equipment more particularly designated as “Type 2-S equipment designed for use with two simple projectors for film and disc reproduction” for the electrical reproduction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, and of your failure to perform the terms of a similar agreement, similarly modified, covering similar equipment in your theatre in Ketchikan, Alaska, and in view of your default in performing the terms of these agreements both in respect to your Juneau and Ketchikan theaters, on behalf of the Electrical Research Products, Inc., I hereby make demand upon you for the immediate return to it of the aforesaid equipment at each of said theaters.

(Testimony of W. D. Gross.)

Unless you notify me on or before Tuesday, March 31, 1931, that you will immediately return the above described equipment which is now in each of your Coliseum Theaters in Juneau and Ketchikan, action will be promptly instituted against you by the Electrical Research Products, Inc., to recover from you the possession of this equipment now in your Juneau theater and of this equipment now in your Ketchikan theater, together with damages for the detention thereof.

Yours very truly,

RER:H

(Signed) R. E. ROBERTSON''

Thereupon defendant Gross further testified: That letter defendant's exhibit F-10 was received by me prior to the time I put up the bond; it was written after the bond was put up in the attachment suit. After receiving that letter I saw Robertson and told him that the bond was put up, why didn't they wait and see if the Court says I have to pay service charges or not; he claims he is the Court and will take this into his hands and he said if I don't pay the money right off he would tear the machines out; that is all the conversation I know; I went to my office and talked to my manager and he told me he would go see Robertson and see what he could do, and he came back and he advised me to take the first boat and go outside and buy other machines; the boat was in port, I took the boat, left for Seattle,

(Testimony of W. D. Gross.)

wired Universal High Power to have two machines ready, one for Juneau and one for Ketchikan. [239]

Whereupon the following proceedings were had:

“Q. Why did you go there to buy two new machines?”

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.

The COURT: It may be received on the same theory as this other testimony.

Mr. ROBERTSON: Exception.

A. I received a letter from Mr. Robertson—that he was going to replevy the machines, so I immediately took the boat and wired Seattle to have two machines ready, one for Juneau and one for Ketchikan; and to install it here in Juneau and Ketchikan to prevent shut-downs.”

Thereupon Witness Gross further testified: If the machines were replevined, I would have to close the house up; I paid cash for the two machines, buying them outright from Universal High Power; I couldn't procure immediately any other machines except by waiting two or three months; I installed those machines, one in Juneau and one in Ketchikan.

Whereupon Defendant Gross was asked the question by his counsel: “What did you pay for those machines?”, to which plaintiff objected on the ground it was incompetent, irrelevant, and immaterial, which objection was overruled and to which plaintiff excepted; Witness Gross then answered, “\$2,500.00, more or less”.

(Testimony of W. D. Gross.)

Thereupon two checks, both drawn on The B. M. Behrends Bank of Juneau, Alaska, by defendant, in favor of Universal High Power, one dated April 4, 1931, for \$1,000.00, and one dated April 10, 1931, for \$1,540.00, marked

DEFENDANT'S EXHIBIT F-11,

were received in evidence, over plaintiff's objection that they were immaterial, which objection was overruled and to which ruling plaintiff excepted.

Thereupon Witness Gross further testified: Those two checks, defendant's exhibit F-11 are in my own handwriting and paid for those two machines that I bought.

Whereupon the following proceedings were had:

[240]

“Q. Did you have any other additional expenses in connection with these machines?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial and not a proper element of damages in this case.

The COURT: It may be admitted.

Mr. ROBERTSON: Exception.

A. I had freight.

Q. Did you pay freight on these machines?

A. Yes.

Q. How much?

A. I can't exactly tell until I look my books over.

(Testimony of W. D. Gross.)

Q. Did you pay any more money for extra parts of these machines?

A. Yes.

Q. How much?

A. I can't tell off-hand.

Q. Did you pay anything for installation charges?

A. Yes sir.

Q. How much?

Mr. ROBERTSON: Same objection.

The COURT: Same ruling.

Mr. ROBERTSON: Exception."

A. I can't tell just exactly what the installation amounted to.

Q. You would have to look that up too, would you?

A. Because the Western Electric Company too——

Q. Mr. Tuckett will probably know about that?

A. Yes."

Thereupon Witness Gross further testified: After I brought these machines up to Juneau, I had one day of dark house in Juneau and the next day I started to run on the new equipment; they jerked out the old equipment and sent it to Los Angeles; Robertson served papers on me in the replevin suit.

[241]

Whereupon the following proceedings were had:

“Q. What was done under the replevin writ at that time, in your presence?

(Testimony of W. D. Gross.)

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.—Not the best evidence.

Mr. HELLENTHAL: We can impeach the writ of the Marshal, if there is anything to impeach upon it. I don't know, there may be.

The COURT: He may state what was done.

A. Mr. Robertson and two deputies and Mr. White come into the office and wanted me to open up the operating booth. I refused to let them in and Mr. Robertson told them to get crow bars and open up the door.

Mr. ROBERTSON: Object as not responsive.

The COURT: The latter part of his answer will be stricken.

Q. Mr. Gross, what was done, in your presence, in connection with the taking away of these machines?

A. Mr. Robertson and the two deputies and Mr. White asked me to open the door to the operating booth to get the machines out.

Q. Did you have any conversation with either or both of them?

A. I asked Mr. Robertson to give me time. Mr. Robertson stated no more time would be given, they would have to have the machines at once and wanted the two deputies to go into the operating booth and jerk the machines out. After they started to break open the door we

(Testimony of W. D. Gross.)

opened the door to the operating booth and they took the machines out.”

Thereupon Defendant Gross testified further: I also hired Witnesses Dahlner and Clayton, independent installation engineers, one for Juneau and one for Ketchikan, and brought them here, the manager hired them in April, 1930, stationed them in different places to install the machines and take care of them; they went around my circuit of seven theatres; I kept them in Juneau and Ketchikan not at all times, only when it was necessary; the extent of my schooling was as far as the eighth grade; I remained in Seattle two weeks after signing those modifying contracts, plaintiff's exhibits Nos. 2 and 4, and then came home stopping off at Ketchikan, arriving in Juneau on about the same day or day before I wrote to Gage my letter, defendant's exhibit F-13; up to that time I hadn't been in Juneau but had been on the circuit. Mrs. Gross, who was with me, did not stop in Ketchikan but went on to Juneau. [242]

Thereupon the following proceedings were had:

“Q. Had you ever authorized Mr. Tuckett to make any service payments, any payments of service charges?

A. No.

Q. Neither then or any other time?

A. No.

Mr. ROBERTSON: Object as leading.

(Testimony of W. D. Gross.)

The COURT: It was leading, but it doesn't amount to anything."

Thereupon Witness Gross further testified: I did not know at that time what effect the threats that Gage had made had upon the legality of the contracts, I first learned that from Simon Hellenthal in April or May, 1930, I am not sure about the date. I meant by "No Court would sustain the contract" in my letter, defendant's exhibit F-3, that we didn't have no service and if I could prove it I didn't think the Court would uphold it.

Thereupon plaintiff's letter to defendant, dated August 7, 1929, was received in evidence, marked

DEFENDANT'S EXHIBIT G,

and reads:

"Exhibit G

ELECTRICAL RESEARCH PRODUCTS, INC.

Subsidiary of

WESTERN ELECTRIC COMPANY,

INCORPORATED

New York

August 7, 1929.

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

In order that your theatres at Juneau and Ketchikan may be more readily protected against accidental shut-downs, we recommend that you place an

order with us to carry additional spare parts in each one of your theatres, as follows:

- 2 Spare Tungar Bulbs #189048 to each theatre\$ 8.00 each
- 1 708-A Motor Control (to be held at either town) 500.00
- 1 11-A Connecting Block to each theatre .17
- 1 702-A Fader to be held at either town 265.00

[243]

We will furnish each one of these theatres with an electric soldering iron without additional charge, to be held in the spare parts cabinets for use on our equipment.

Although we carry all of these items in our Seattle stock as regular emergency replacement equipment, it would take so long to get them to Juneau and Ketchikan that the shortage of these items might at some time cause you and your audiences inconvenience, if they were not readily available.

Yours very truly,

NL-S Western Division Manager.”



Thereupon Defendant Gross further testified: Witness Lawrence was plaintiff’s service engineer, traveling around Alaska.

Thereupon the following proceedings were had:

(Testimony of W. D. Gross.)

“Q. What, if anything, did Mr. Lawrence do in taking out the machinery?”

Mr. ROBERTSON: I make the same objection, the return of the Marshal’s writ is the best evidence of what was done about replevining the equipment. There is no allegation here concerning malicious issuance of a Writ of Replevin;—incompetent, irrelevant and immaterial.

The COURT: It will be received on the same basis as the other testimony, as part of the general course of events.

Mr. ROBERTSON: Exception.

A. Mr. Lawrence asked Mr. Robertson that he should wire the States for instructions. Mr. Robertson told him he had his instructions and for him to start taking out the equipment.

Q. What, if anything, did Mr. Lawrence do?

A. After the opening of the door he went in and started to dismantel the equipment.

Q. What do you mean by “dismanteling”?

A. Well, started to pull it out, to pull out the parts which belonged to them, their equipment.

Q. Did they take it apart?

A. Took it all apart, dismanteled it and put it up in the balcony.

Q. When was that done by Mr. Lawrence?

A. The same day about 4 o’clock.

Q. The same day about 4 o’clock?

(Testimony of W. D. Gross.)

A. The same day about 4 o'clock, and at the same time started [244] dismanteling the machinery.

Q. After it had been dismanteled by Mr. Lawrence, could you assemble it?

A. No sir.

Mr. ROBERTSON: Same objection.

Q. Could you, or any of your men, re-assemble it?

A. No.

The COURT: I think it may go in for what it is worth.

Mr. ROBERTSON: Exception.

A. Couldn't do it without a blueprint.

Q. Did you have a blueprint?

A. No.

Q. Mr. Gross, after the equipment was taken out what is the first thing you did?

A. I started to install my own machines.

Q. You started to install your own machine that you had brought up?

A. That I had brought up—the same day.

Q. What did you do in that connection?

A. Had my engineer to install it. I wired for him. He was at that time at Haines.

Q. Who was that?

A. Clayton.

Q. One of the men you brought up previously for such jobs?

A. Yes.

(Testimony of W. D. Gross.)

Q. Did Mr. Clayton come down?

A. Yes, he was there the same day—he was there prior to it.”

Thereupon Defendant Gross further testified: Clayton installed the new equipment; my Juneau show was closed one night, then I opened the show with the new equipment, by which I mean the new equipment I bought in Seattle, and shipped up here just before that.

Whereupon the following proceedings were had:

[245]

“Q. How did the equipment you have now installed, which you speak of as the new equipment, compare with the old equipment that had been torn out—as to efficiency?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.

The COURT: It may be admitted. It is part of the allegations of the answer.

Mr. ROBERTSON: Exception.

A. The equipment wasn't the same as the Western Electric Company. It was cheaper equipment, and that was the only equipment at that time I could get.

Mr. ROBERTSON: I move to strike that last as not responsive.

Mr. HELLENTHAL: He already testified to that before.

The COURT: It is already in the record.

(Testimony of W. D. Gross.)

A. That is the only equipment I could get.

Mr. ROBERTSON: Object as not responsive.

Mr. HELLENTHAL: (to witness) Confine your answers to the question as near as you can. I will ask you about the other things later.

Q. How did it compare as to quality. Was the sound as good or was it not as good?

A. No, the sound was bad.

Mr. ROBERTSON: Objection.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

Q. How bad?

A. Very bad—lost all my business. We started to lose our business.

Q. The sound was very bad?

A. Yes.

Q. What did you do in the way of trying to remedy the sound and make it better?

A. Tried some other equipment; we borrowed some better equipment—after—and couldn't do it any good.

Q. What effect did that have on your business?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.

The COURT: I think the question is competent; he may answer. [246]

Mr. ROBERTSON: Exception.

(Testimony of W. D. Gross.)

Q. Now, Mr. Gross, what effect, if any, did the fact that you had inferior equipment in your theatre have upon the business of the theatre?

Mr. ROBERTSON: May I ask that my objection be considered as going to all this line of testimony?

The COURT: Very well.

A. Lost business. It began to go down, lost business.

Thereupon Witness Gross further testified: My business gradually went down; I done all the improvements I could to get this equipment up to standard; I couldn't do it; the effect upon the profits was that I considered I lost from about two to three thousand dollars a month in Juneau and the same in Ketchikan; I lost that much; my moving picture theatre business had always been profitable; never had any unprofitable business until this machinery was taken out; during the time that the Western Electric equipment was in my Juneau theatre I made money; after it was taken out I started losing money.

Whereupon the following proceedings were had:

“Q. What effect upon your financial condition did the removal of that equipment have?”

A. Well, we went back on all the taxes, we drew all the money from all the small theatres, five theatres, we went back on the interest on the money we owed B. M. Behrends, —\$60,000.00 at that time, and rent money at

(Testimony of W. D. Gross.)

that time \$900.00 a month, we used that to keep the Juneau and Ketchikan Coliseum theatres going until we leased it to B. F. Shearer.

The COURT: Is it understood these objections apply to each of these questions?

Mr. HELLENTHAL: Yes, that is agreeable.

The COURT: The last one will be stricken, as too remote.”

Thereupon Defendant Gross further testified: The removal of the equipment in my Ketchikan theatre had the same effect as in Juneau; I had done the same there as I had done in Juneau, bringing up the equipment from below; the character of the sound produced by that new equipment in Ketchikan as compared with the [247] Western Electric equipment that was taken out, was bad; the effect upon my Ketchikan business was I started to lose business and had to turn over the theatres; it went down until we had to turn over my Ketchikan theatre, unable to operate; it had paid at all times up to that time, both before and after the installation of the sound equipment; never was a time when the Ketchikan theatre was not a profitable enterprise; never made any profit after the Western Electric equipment had been taken out; I lost in profits by reason of the removal of that equipment from Ketchikan theatre from two to three thousand dollars a month in each theatre; after that I turned my theatres over to B. F. Shearer Company on a lease.

(Testimony of W. D. Gross.)

Whereupon the following proceedings were had:

“Q. Did you have any arrangement with B. F. Shearer for the sharing of profits, that is what I am trying to get at?

A. Yes sir.

Mr. ROBERTSON: Same objection.

Mr. HELLENTHAL: The purpose is to show immediately when other Western Electric Company theatre equipment was installed by Shearer and Gross the thing began to pay again.

The COURT: It may be received for that purpose.

Q. Did you have any arrangement with Shearer under which you shared the profits of those theatres?

A. Yes sir.

Mr. ROBERTSON: Same objection.

The COURT: It may be received.

Q. What, if anything, did Shearer do in the way of installing Western Electric Equipment in these theatres after you had turned the theatres over to him?

The COURT: It may be received to show the changed conditions, if any?

Mr. ROBERTSON: Exception.

A. He threw my equipment out.

Q. What did he do about putting in Western Electric?

A. Negotiated for it and installed one at Juneau and one at Ketchikan.

(Testimony of W. D. Gross.)

Q. Was that the same kind of equipment that had been taken out of your theatre?

A. Yes.

Q. What effect, if any, did that have on your business?

A. The business picked right up. [248]

Mr. ROBERTSON: Same objection, if the court please.

The COURT: He may show the changed condition, if any. He can't go any further.

Mr. ROBERTSON: Exception.

A. Business went up.

Q. Did Shearer install Western Electric equipment at once?

A. Took about two months after he got permission from me.

Q. During the time he operated on the old equipment what was the condition of the business?

A. Couldn't make any money.

Mr. ROBERTSON: Same objection, if the court please.

The COURT: Objection overruled.

Mr. ROBERTSON: Exception.

A. He held it down for two months and when he found out he can't make any money on my equipment—

Mr. ROBERTSON: Object as not responsive.

(Testimony of W. D. Gross.)

Q. Answer my question. While he had the old equipment did he make any profit?

A. No.

Q. When he got the new equipment, in, the Western Electric equipment, did he make any profit?

A. Yes.

Q. Immediately on the restoration of the old equipment?

A. Yes."

Whereupon Defendant Gross testified further: I put this old equipment I brought up from Seattle in storage; it didn't have any value at that time as they had modernized the equipment and it was obsolete, had no junk value, no market for the old equipment at all and the freight would cost more than the junk would pay for; I did not keep my books myself my bookkeeper did; I knew the condition of my banking account and of my indebtedness to the bank at that time and whether my taxes were paid, and the condition of other matters in relation to my business that came under my personal observation; while I had the good equipment I paid [249] interest on my indebtedness to the bank right along but after my equipment was taken out I did not have money to pay it either, same way about taxes; we tried to avoid all expenses to keep the Coliseum at Juneau going; I had five other theatres besides the Juneau and Ketchikan theatres

(Testimony of W. D. Gross.)

and they were all paying; and their profits went to keep up the Juneau and Ketchikan Coliseum theatres; [250] I had \$900.00 to \$1,200.00 a month in rent and that also went to keep the Juneau and Ketchikan theatres open.

Cross Examination

Thereupon Defendant Gross testified further: I have no idea what profits I have made from the Coliseum theatre in Juneau since Shearer took it over about May 1, 1933, but I was supposed to get 40% of it; I have no idea until I look at the books and I haven't looked at the books in preparation for this trial, the bookkeeper has the books; I receive the profits every three months, the last time was three months ago when I received two or three thousand dollars as my share; it might be more; that was from the two theatres; I have Shearer's statement for the month of December, 1934, showing how much money they paid out and took in, showing they made \$80.00 at the Coliseum theatre that month and the Capitol Theatre in Juneau made \$1,505.71, actual profit; I won't receive my share of it until next month; we divide every three months; my share of the net profits in the Coliseum Theatre is 40%; and my share of the profits is 40% from the Capitol Theatre in Juneau; I have a statement here from Shearer.

Whereupon plaintiff requested defendant to produce the statement, which was the plaintiff's exhibits Nos. 29-A and 29-B, and reads as follows:

(Testimony of W. D. Gross.)

"EXHIBIT 29-A

JUNEAU EMPIRE THEATRES, INC.

1934

Capitol Theatre Juneau (in pencil)

	<u>November</u>	<u>December</u>
Receipts:		
Box Office	4,208.10	4,157.32
Slide Rental	1.36	
	<u>4,209.46</u>	<u>4,157.32</u>
		[251]
Expenses:		
Film Rental	1,137.70	1,060.00
Freight	59.60	51.12
Advertising—Bill Poster	169.10	142.22
Advertising—Newspaper	283.70	264.00
Advertising—Miscellaneous	61.60	87.74
Salary—Manager	166.66	166.70
Salary—Operator	102.00	102.00
Salary—Miscellaneous	372.60	402.25
Projection Room and House Supplies	38.78	40.42
Rent	200.00	200.00
Heat	23.10	46.20
Light	150.46	151.00
Telephone and Telegraph	5.16	21.45
Office Supplies	1.04	8.90
Postage		3.88
Insurance	22.04	22.04
Depreciation	41.88	47.77
Maintenance	73.60	
Bank Charges	10.49	7.02
Tax on Checks	1.37	1.15
Rental on Sound Equipment	80.00	80.00
Taxes and Licenses		56.75
Rental of Uniforms	6.00	9.00
	<u>3,006.88</u>	<u>2,971.61</u>
Net Profit	1,202.58	1,185.71

SUMMARY

Capitol	1,202.58	1,185.71
Coliseum	—350.50	—80.00
Total Net Profit	<u>852.08</u>	<u>1,105.71</u>

EXHIBIT 29-B

JUNEAU EMPIRE THEATRES, INC.

1934

Coliseum Theatre Juneau (in pencil)

	<u>November</u>	<u>December</u>
Receipts:		
Box Office	2,317.95	2,386.40
Slide Rental		75.00
	<hr/>	<hr/>
	2,317.95	2,461.40
<hr/>		
Expenses:		
Film Rental	1,162.85	1,082.75
Cost of Added Attractions	85.50	
Freight	29.80	25.55
Advertising—Bill Poster	114.03	71.11
Advertising—Newspaper	162.95	182.70
Advertising—Miscellaneous	27.43	71.88
Salary—Manager	83.34	83.30
Salary—Operator	90.00	90.00
Salary—Miscellaneous	297.90	317.25
Projection Room and House Supplies	16.31	5.00
Rent	200.00	200.00
Heat	30.13	43.93
		[252]
Light	104.70	119.75
Water	2.00	2.00
Telephone and Telegraph	5.14	21.44
Office Supplies	1.03	8.89
Postage		3.87
Insurance	27.12	27.12
Maintenance	115.00	
Bank Charges	10.49	7.01
Tax on Checks	1.37	1.15
Rental on Sound Equipment	95.36	119.20
Taxes and Licenses		48.50
Rental of Uniforms	6.00	9.00
	<hr/>	<hr/>
	2,668.45	2,541.40
Net Profit or Loss	—350.50	—80.00''

(Testimony of W. D. Gross.)

Thereupon Defendant Gross further testified: Exhibit No. 29-B covers the months of November and December, 1934, and shows a loss \$80.00 for the Coliseum Theatre in Juneau for December and \$350.50 for November; when I spoke about getting profits from Shearer I also included therein profits made from the operation of the Capitol Theatre; under the agreement with Shearer I receive one-third of the profits of the Revilla and Coliseum Theatres in Ketchikan; for December, 1934, the Ketchikan Coliseum Theatre made a profit of \$287.00 and for November, 1934, \$1634.88, of which I get one-third. These are the Statements:

Whereupon plaintiff offered in evidence the statements produced by defendant, which were then received in evidence, marked plaintiff's exhibits 30-A and 30-B, respectively, and read:

“EXHIBIT 30-A

ALASKA EMPIRE THEATRES, INC.

1934

	Coliseum Theatre	Ketchikan (in pencil)																																
		<table> <thead> <tr> <th>November</th> <th>December</th> </tr> </thead> <tbody> <tr> <td>Receipts:</td> <td></td> <td></td> </tr> <tr> <td>Box Office</td> <td>3,481.15</td> <td>3,170.76</td> </tr> <tr> <td>Slide Rental</td> <td>200.00</td> <td></td> </tr> <tr> <td></td> <td><hr/></td> <td><hr/></td> </tr> <tr> <td></td> <td>3,681.15</td> <td>3,170.76</td> </tr> <tr> <td>Expenses</td> <td></td> <td></td> </tr> <tr> <td>Film Rental</td> <td>711.02</td> <td>628.32</td> </tr> <tr> <td>Cost of Added Attractions</td> <td>53.25</td> <td>488.00</td> </tr> <tr> <td>Freight</td> <td>30.95</td> <td>29.74</td> </tr> <tr> <td>Advertising—Bill Posters</td> <td>26.26</td> <td>38.33</td> </tr> </tbody> </table>	November	December	Receipts:			Box Office	3,481.15	3,170.76	Slide Rental	200.00			<hr/>	<hr/>		3,681.15	3,170.76	Expenses			Film Rental	711.02	628.32	Cost of Added Attractions	53.25	488.00	Freight	30.95	29.74	Advertising—Bill Posters	26.26	38.33
November	December																																	
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(Testimony of *W. D. Gross.*)

	<u>November</u>	<u>December</u>
Advertising—Newspapers	96.30	104.62
Advertising—Miscellaneous	61.70	88.58
Salary—Manager	125.00	100.00
		[253]
Salary—Operator	90.00	90.00
Salary—Miscellaneous	266.30	239.65
Projection Room and House Supplies	1.25	28.62
Rent	200.00	200.00
Heat	60.72	74.92
Light and Power	54.30	62.95
Telephone and Telegraph	20.04	21.47
Office Supplies	1.13	1.81
Postage	3.25	5.00
Taxes and Licenses		47.79
Tax on Checks	1.27	.79
Depreciation on screen and carpet	33.21	33.21
Insurance	31.73	31.73
Sound Rental	122.76	153.45
Maintenance	20.89	59.43
Rental of Uniforms	6.00	8.50
Silver Night Expense	102.80	125.00
Water	5.70	5.70
	<u>2,125.83</u>	<u>2,667.61</u>
Net Profit	1,555.32	503.15

SUMMARY

Revilla	79.56	—215.32
Coliseum	1,555.32	503.15
	<u>1,634.88</u>	<u>287.83''</u>

(Testimony of W. D. Gross.)

"EXHIBIT 30-B

ALASKA EMPIRE THEATRES

1934

Revilla Theatre Ketchikan (in pencil)

	<u>November</u>	<u>December</u>
Receipts:		
Box Office	1,891.60	1,568.39
Slide Rental	72.50	110.00
	<hr/>	<hr/>
	1,964.10	1,678.35
<hr/>		
Expenses:		
Film Rental	716.39	636.75
Freight	30.94	29.72
Advertising—Bill Poster	26.26	38.31
Advertising—Newspaper	79.99	81.80
Advertising—Miscellaneous	84.24	156.56
Salary—Manager	125.00	100.00
Salary—Operator	75.00	75.00
Salary—Miscellaneous	241.80	234.60
Projection Room and House Supplies	22.72	11.80
Rent	100.00	100.00
Heat	30.00	30.00
Light	35.30	39.80
Water	3.35	3.35
Telephone and Telegraph	20.09	21.45
Office Supplies	1.13	1.81
Postage	3.25	5.00
Taxes and Licenses		36.54
Tax on Checks	1.19	.69
Rental on Sound Equipment	100.00	100.00
Depreciation	6.71	10.06
		[254]
Insurance	15.18	15.18
Employees Bond		30.00
Silver Night Expense	102.80	125.00
Maintenance	57.20	1.75
Rental of Uniforms	6.00	8.50
	<hr/>	<hr/>
	1,884.54	1,893.67
Net profit or loss	79.56	-215.32

(Testimony of W. D. Gross.)

Thereupon defendant Gross further testified: During November and December, 1934, Western Electric equipment was in the Juneau Coliseum Theatre and R. C. A. equipment was in the Juneau Capitol Theatre; I am unable to give a single month of my own knowledge in which I made \$3,000.00 profits from the operation of the Juneau Coliseum Theatre during the time Western Electric equipment was in there, I don't know anything about it; we have a record on it and the bookkeeper is working on it and will bring it into Court; I swore in my amended answer in this suit before it was filed that I lost \$2,000.00 a month profits from the Juneau Theatre; I gave my deposition in this suit March 16, 1932, before Deputy Clerk Leivers, and in accordance with plaintiff's demand; I had a statement prepared by Jack Davis and gave it to my attorney Si Hellenthal, but I have no recollection of it, but I know plaintiff's attorney Robertson got a statement on the income tax account, but that wouldn't give the right statement; I have a copy of the income tax statement now but the bookkeeper will bring them to the Court; I don't have them with me; I don't know how much income I make in a year, all I know is we paid taxes of \$3,000.00 a year for 1929 and 1930, while we had the Western Electric machines; I don't know exactly what my total receipts from the Juneau Theatre were from April 1, 1930, to March 31, 1931; might run \$48,000.00 close to \$50,000.00; I have no idea what my expenses or what my profits

(Testimony of W. D. Gross.)

were during that period; I have no idea, until the bookkeeper can present his statements, of a single month during that period when I made as much as \$2,000.00 a month profit, but I never made a loss; I can't give from my own recollection, the amount of profit I made for any single month during that period [255]

I didn't know anything about the law when I signed those contracts, plaintiff's exhibits Nos. 2 and 4, and didn't know anything about the law or my rights.

Whereupon the following proceedings were had:

Q. You told Jack Hellenthal this morning you first consulted Si Hellenthal when?

A. When you filed the papers for recovery of the service charges.

Q. That is the first time you ever went to a lawyer about it?

A. Yes.

Q. You never consulted any lawyer about it prior to that time?

A. It wasn't necessary.

Q. When did you first decide that these contracts, plaintiff's exhibits "2" and "4" were no good, they weren't valid? When did you first decide that?

A. The original contracts?

Q. Yes, the originals of these contracts, "2" and "4"—when did you decide they were no good?

A. This wasn't the original contract.

(Testimony of W. D. Gross.)

Q. Those are copies.

A. No, this was not the original contract; it was a supplemental contract for me to sign because they said——

Q. Never mind what they said. When did you decide the supplemental contracts were no good and were not valid?

A. I signed this contract——

Q. I asked you when you decided they were no good, and ask you to answer that question.

A. When I seen my lawyer he looked it over.

Q. He told you they were no good?

A. At that time I felt I had to sign it.

Q. I am asking you when you decided these supplemental contracts “2” and “4” were no good. When did you decide that?

A. I can not remember just the date.

Q. Didn't you think so at the time—they were no good?

A. They threatened me.

Q. Answer the question—Didn't you think at the time they [256] were no good?

A. I have no knowledge as to that, if I thought of anything I wouldn't sign it.

Q. How soon after you signed them did you reach the conclusion they were no good?

A. When I got back to Juneau I felt sorry I signed them.

Q. In your own mind you decided then they were no good. That was before you ever even

(Testimony of W. D. Gross.)

consulted any lawyer, you decided they were no good?

A. At that time, yes.

Q. That was after you returned to Juneau on November 10th, 1930?

A. Yes sir.

Thereupon defendant Gross further testified: even before I consulted any lawyer, I decided they were no good; when I signed that letter of February 17, 1930, defendant's exhibit F-4, I meant by the statement "No court will uphold this agreement when the service has been as it have in the past" that when I signed I was obligated to pay \$30,000.00 more for service when I didn't get it, that is what I meant; I had got service at no time up to that time; that wasn't because I was away, I was quite often here; I know plaintiff's engineers had been coming here, to inspect the machinery and sell merchandise; I had signed one of these reports and got a copy of it and still have the copy; when I said that I didn't receive any reply to my letters, defendant's exhibits F-4 and F-5, I meant that my office might have received a reply but I didn't; I don't know whether we received any reply or not but I don't think so; I never did any business with plaintiff in San Francisco; that was an error of mine or my manager in sending my letter of March 28, 1930, Defendant's Exhibit F-5, to San Francisco, but the letter never came back; I have no knowledge of any reply to my letter of September 15, 1930, defendant's exhibit F-7; my

(Testimony of W. D. Gross.)

manager might have answered [257] that letter, defendant's exhibit F-6; I can't recollect whether or not I answered it; I don't know whether I was in Juneau in June, 1930; I know we received that letter, defendant's exhibit F-6, but I don't know whether or not we ever answered [258] it; if Tuckett answered it he never showed me any purported copy of it.

Whereupon the following proceedings were had:

“Mr. ROBERTSON: I would like to ask at this time if counsel have the books we mentioned this morning.

Mr. HELLENTHAL: The books?

Mr. ROBERTSON: Yes.

Mr. HELLENTHAL: No. We have those books, and will exhibit them to counsel, but we are not going to bring them up here. We will offer them in evidence when the proper time comes, but I don't think counsel can get head or tail of them until the bookkeeper explains them.

Mr. ROBERTSON: We made demand for the production of the books before the trial started, and are entitled to see the books and not wait until the last moment.

Mr. HELLENTHAL: We will give them to you for inspection any time you want.

Mr. ROBERTSON: What time will it be convenient?

Mr. HELLENTHAL: Whenever it suits your convenience, but I suggest you wait until

(Testimony of W. D. Gross.)

the bookkeeper explains them, so you will know something about them.

Mr. ROBERTSON: We may have just as good bookkeepers as Mr. Gross.

Mr. HELLENTHAL: I have doubts you have a bookkeeper that knows as much about these books as the man that kept them; that is the point I am trying to get at.

Mr. ROBERTSON: That gives us no opportunity to challenge Mr. Gross on his own books.

Mr. HELLENTHAL: Mr. Gross knows nothing about them.

The COURT: That is true. I suppose under the circumstances you can reserve that part of the cross-examination until you get possession of the books.

Mr. HELLENTHAL: I will explain to counsel we have made a summary from the books and all the items he is inquiring about, profit and loss, including Shearer, which will be produced in evidence at the proper time and counsel will be given an opportunity to examine the books and check them up.

Mr. ROBERTSON: Of course we want to see the books ourselves and check the summary as shown by the books."

Thereupon Witness Gross further testified: I don't know whether I ever went to see Attorney

(Testimony of W. D. Gross.)

Robertson in response to his letter, defendant's exhibit F-9; I think the bookkeeper did; I don't know anything about whether or not Tuckett also received a [259] copy of it; I recollect I called on Attorney Robertson next day after receiving his letter, defendant's exhibit F-10; I don't know what day of the week or month; I don't know whether I went to see him or telephoned him; I don't remember anything about it; I told him that I didn't owe these people any money and nothing else; I didn't tell him that until receipt of that letter, I had known nothing about this controversy and my manager had concealed it from me, but I did tell him that I had a deal on with Captain Lathrop by which he was going to buy my entire string of six theatres; I have no idea what I told him; I don't remember what I said, but Captain Lathrop offered \$150,000.00 for the Juneau and Ketchikan Theatres; I didn't tell Robertson I wanted further time within which to pay plaintiff's bill or within which I might go to Seattle to see Captain Lathrop or that either Captain Lathrop or I would wire him the money next Monday; I didn't owe money to those people; I went to Seattle immediately after I received that letter threatening to replevin, going to Seattle the same day, and wired for two machines; I don't remember whether Robertson told me that he would give me until April 6, within which to pay the bill before he started suit; I have no recollection of it; I don't recall any wires to Robertson after I went to Seattle; the day the talkie equipment was re-

(Testimony of W. D. Gross.)

plevined, Robertson came to my Juneau Theatre with two deputy marshals and Marshal White about four o'clock, Lawrence was also there, Charles Tuckett and myself; I don't know the deputies' names; I believe that Robertson came with the deputies; I was there all the time; I was downstairs in the office but I went upstairs when the marshals tried to break in the doors; I heard Robertson tell the marshals to break in the door; Marshal White was there, he will say to which deputies Robertson said that; the booth was locked at the time; it is locked all the time after the show, and it was locked by the people who run the show that night, by the operators; don't know who was running the show that night as I had several of them—Ned Lemieux, Charlie Tuckett, Billy Burke, Zolman Gross, and Donald Sinclair; [260] the only man present there when Robertson was there was Charles Tuckett and myself; it didn't take the deputy marshals any time to replevin that equipment, I have no idea of the time they were there; when the marshals started to break in the door, Tuckett gave them the key and Lawrence disconnected and took the equipment out; Tuckett never even touched the equipment but protected his own property; it wasn't his, it belongs to us; Tuckett did not disconnect any equipment, at least I don't think so, but I don't know, I didn't disconnect any equipment; I had the Masterphone Sound Equipment there at that time on the backstage; I never told Charlie Tuckett to throw plaintiff's equipment out in the

(Testimony of W. D. Gross.)

bay or to tear it out and throw it in the bay; Clayton was in Juneau at the time but he wasn't upstairs; he was my expert that he been trained for this work; I have no idea what books he trained with; I don't know anything about what he had.

I had one conversation with Witness Gage when I paid him the \$2,000.00, and the other prior to it; I had a conversation with him when I paid him \$538.00 some time in April; I had a conversation with him when I signed plaintiff's exhibits Nos. 2 and 4; Cawthorn, Gage and myself were present when I signed those exhibits on December 30, 1929; the conversation of April was held in a restaurant in Film Row but I signed the checks in Gage's office; that was the next conversation I had with Gage and was during the fore part of April, 1930; had a conversation down in a restaurant and then went to his office; Cawthorn, Gage, and myself were present, Cawthorn again being present on that occasion, he being my representative in Seattle, attending to all my business there at all times; the only threats I know about that Gage ever made were those on December 30, 1929, and April, 1930; there were no other conversations that I remember; that first conversation on December 30, 1929, Gage said that plaintiff writes him and he has to write me and he wants me to sign these contracts, otherwise you know that they pull the machines out; I had a long talk before I signed it, and he said "if a man doesn't pay for his telephone, they take [261] out the tele-

(Testimony of W. D. Gross.)

phone, the same thing will happen to you." That is all I remember; that is the entire conversation; Cawthorn was present during the entire conversation but nobody else; in the conversation of April, 1930, he called me up saying he received a bill from plaintiff and wants to know if I am going to pay it; I met him on Film Row and then went to his office. Cawthorn went out with us; during the conversation in Film Row he said he had a bill and for me to pay it so we went to his office and when we got there he said for me to pay—the same as the chicken don't lay no eggs, head is cut off, same thing they are going to do to me if I don't pay, which statement was made in the presence of Cawthorn; that is all he had to say; I never talked with Gage personally after that; the only threats Gage made were by word of mouth, never made any written threats.

Whereupon the following proceedings were had:

Q. As a matter of fact, didn't Mr. Gage tell you at that time when you signed those contracts you were going to have a man stationed regularly at Juneau and Ketchikan?

A. After I signed the contracts.

Q. Then he did tell you something more in that conversation at that time?

A. He stated previously to it, he said he was going to install a man in Juneau and Ketchikan.

(Testimony of W. D. Gross.)

Q. What did he say about that?

A. After I paid him that money he said he was going to try to persuade the company to put a man in Juneau and Ketchikan.

Q. Isn't that the reason why you paid the service charges?

A. No; because of those threats.

Q. You didn't pay the service charges for that reason?

A. No.

Q. Did you make that payment to Mr. Gage solely because of Mr. Gage's threats against you on December 30th, 1929, about what he would do about taking those talkie machines out?

A. Yes.

Thereupon witness Gross further testified: I first found out plaintiff wanted me to pay for that service when I was in the East; I didn't know about it before I went East; I went East in [262] September, 1929; I received a wire from my manager that the service bills showed up and he wants me to take it up with the Seattle Office but I didn't know anything about it; I hadn't received letters from plaintiff before I went East demanding payment of service charges and my office had not received them so far as I know.

Whereupon the following proceedings were had:

Q. Not what you know. Now, Mr. Gross, you remember you gave your deposition in the other suit, before Mr. Leivers, as Deputy Clerk,

(Testimony of W. D. Gross.)

on March 16th, 1932, in the Clerk's office, in the presence of Si Hellenthal, Bert Faulkner, Mrs. Ada Sharples and myself?

A. Yes sir.

Q. I ask you to say whether or not you didn't say at that time, "He" referring to Mr. Gage, "made that threat when I received letters to settle the service charges and after I decided to pay [263] the service charges he said before witnesses that he would see if I paid the service charges he would have a man stationed at Juneau and one at Ketchikan, on the strength of that I paid the service charges."

I ask you if you didn't make that statement in response to my question when I asked you:

"I now ask you to state, Mr. Gross, when he made that threat to you?"

A. I made——

Q. Answer the question—whether or not in response to this question I asked you at that time in the Clerk's office before Mr. Leivers as Deputy Clerk, in the presence of Bert Faulkner, Si Hellenthal and Mrs. Ada Sharples and myself I asked you the question:

"I now ask you to state, Mr. Gross, when Mr. Gage made that threat to you" and didn't you answer:

"He made that threat when I received letters to settle the service charges and after I de-

(Testimony of W. D. Gross.)

cided to pay the service charges he said before witnesses that he would see if I paid the service charges he would have a man stationed at Juneau and one at Ketchikan. On the strength of that I paid the service charges.”

I ask you—Did you or did you not make that statement at that time?

A. I might have made the statement, but I never signed it.

Q. Is that statement as reported by the reporter at that time true or false?

A. I can't recollect anything about it.

Q. You can't recollect anything about it?

A. I never had any knowledge of it.

Q. Are you able to say now whether or not that statement is true or false?

A. If I had looked over the deposition I would tell them it is incorrect.

Q. If you had looked over the deposition you would tell them it is incorrect.

A. Yes.

Q. You never came up to the court house to correct the deposition, did you?

A. You never asked me to.

Q. You never came up to the court house to correct the deposition did you?

A. You never made me sign it.

Q. Answer the question. Did you ever come up to the court house to correct it? [264]

A. No

(Testimony of W. D. Gross.)

Q. Now, then, did you in that statement say this part of it:

“He made that threat when I received letters to settle the service charges”? Did you make that part of the statement?

A. No.

Q. You did not make that either?

A. No, it was all wrong.

Q. You didn't say at that time:

“On the strength of that I paid the service charges”?

A. No, I was at that time east.

Q. I ask you to say whether at that time, in the presence of Mr. Hellenthal, Mr. Leivers, Mr. Faulkner, myself and Mrs. Sharples you didn't say:

“On the strength of that I paid the service charges.”

A. I never looked over my testimony so I don't know what I said at that time.

Q. Is that the best answer you can give to my question at this time?

A. Yes sir.

Q. I ask you to state whether or not, Mr. Gross, at the same time and place, that is, March 16th, 1932 in the Clerk's office of this court, before Mr. Leivers as Deputy Clerk, and in the presence of Mr. Faulkner, Si Hellenthal, Mrs. Ada Sharples and myself you didn't say:

“That is the only conversation—when he said for me to sign this paper” referring to those

(Testimony of W. D. Gross.)

supplemental agreements, "and pay the money, otherwise they will take the machines out or attach the machines."

I ask you whether or not you didn't make that answer in response to my question:

"Is that the only conversation you ever had with Mr. Gage where he made any threats"?

A. That is the same line. I never looked over my deposition.

Q. You are not able to answer, now, whether or not that is true or not?

A. I can't say "Yes" or "No".

Q. Didn't you at the same time and place, in the presence of the same parties, in response to my question asked there, where I asked you:

"That is the only conversation"? Didn't you answer:

"Yes, I paid him on the strength of that"?

A. Strength of what? [265]

Q. That wasn't the question. You answered: "Yes, I paid him on the strength of that"?

A. What was it on the strength of.

Q. I don't know. Wasn't that your answer?

A. I paid him because he threatened to take the machines out.

Q. That is the best answer you can make to that question, Mr. Gross?

A. Yes, to the best of my knowledge.

Tuckett didn't send the originals of plaintiff's exhibits Nos. 2 and 4, to me in the East; I never

(Testimony of W. D. Gross.)

received anything, he just wired me; I didn't take them East with me; I never saw them until I got back in Seattle when Gage showed them to me; I was quite surprised when I received those papers and when plaintiff asked me to pay service charges; I hadn't figured I would have to pay service charges; nothing had happened that led me to believe I was going to pay service charges or that plaintiff was going to ask me to pay service charges.

[266]

I was in good health, was not intoxicated and nothing wrong with me mentally on December 30, 1929.

Plaintiff's equipment was installed in my Juneau Theatre about May 10, 1929, I don't recall whether in that deposition taken on March 16, 1932, in answer to the question "Now Mr. Gross, prior to that—that would be some time about say four or five months after you got your sound reproducing equipment installed in your Juneau and Ketchikan Theatres, prior to that four or five months you never had any idea or knowledge that there were going to be any inspection charges—for inspection and for making minor adjustments—is that correct?" I answered "That is correct." I can't recollect just exactly what I said I don't know whether that is true or not, but if I looked it over I would correct it.

I am unable to state whether or not in that deposition, in response to the very next question, "You

(Testimony of W. D. Gross.)

are absolutely confident", (referring to the previous question) I answered "I am sure". I never looked the deposition over.

I never decided to have plaintiff service my theatres.

Whereupon the following proceedings were had:

Q. I call your attention to a letter written to Mr. Gage on February 10th, 1930, marked Defendant's Exhibit "F-3" and to the words in this; you say: "But after I decided on service and service was given, they have been on the bum and in fact are still on the bum." Do you still say you never decided on service?

A. Only this threat.

Q. What do you mean, you never decided on service?

A. After I signed up for \$30,000.

Q. What \$30,000.

A. In ten years, besides \$21,000.00 I paid for the machines.

Q. Did you make that statement in that letter?

A. Yes, I felt sorry——

Thereupon Defendant Gross further testified: I knew Taylor had stayed up here in the summer of 1829; he installed the machines in Juneau on May 10, 1929, and then he stayed and watched [267] those machines for a week, then he wanted to proceed to Ketchikan to install machines there and I told Charlie Tuckett to go with him; he stayed in Ketchi-

(Testimony of W. D. Gross.)

kan for a week and left Alaska the first part of July.

Whereupon the following proceedings were had:

Q. You knew a man named Albright, serviced your theatre in August or September, 1929, didn't you?

A. Yes, he inspected.

Q. He came up and serviced your theatre?

A. Come up to sell merchandise.

Q. He came up and inspected your theatre?

A. Inspection, but he didn't service.

Thereupon Defendant Gross further testified: He gave me a copy of his reports and I signed for them and got a copy at the time; I don't know anything about Knowlton being here in October, 1929, because I was building theatres at that time and gave all my attention to my theatres; that occupied my time; I don't remember Darragh being here in December, 1929, or Little; I don't know what he looks like; I don't know anything about him; sometimes I was here and sometimes I wasn't during those months; I can't recollect what part of those months I was here; I was building the Wrangell, Petersburg, Sitka, and Haines Theatres in October, November and December, 1929; I went around and visited the buildings; supplied the money, but had architects to supervise the work don't know what dates I was in those towns in October, November, and December, 1929; I went East in September,

(Testimony of W. D. Gross.)

1929; I didn't get back until December; I didn't supervise any of those theatres during that time; I don't think we started to build until afterwards; can't just remember when we did start building them but I know the theatres were in four or five months after I got the independent equipment in April, 1930; money was no object to my trying to get talkie equipment in my theatres; I was willing to spend [268] any amount of money to get them; there was other equipment on the market on April 20, 1931, but I had to wait my turn for it and there was other talkie equipment in April, 1930, when I paid Gage the check for \$538.00; but there was just one equipment at that time to take the place of Western Electric, namely RCA but that didn't require service.

Thereupon plaintiff propounded to Defendant Gross and he answered the following questions:

“Q. Didn't you know that ‘Erpi's’ service charges were apt to be larger than in the ‘States’?”

A. No.

Q. You had no idea of that whatever?

A. No.

Q. You are sure of that?

A. I am positive.”

Thereupon defendant's counsel moved to strike the last two answers on the ground they were incompetent, irrelevant and immaterial, which motion

(Testimony of W. D. Gross.)

was granted, to which ruling plaintiff then excepted. [269]

Thereupon Defendant Gross stated that he had written

PLAINTIFF'S EXHIBIT No. 31

for identification which reads as follows:

“Seattle, Washington.

August 1, 1928

Electrical Research Products, Inc.,
1584 W. Washington St.,
Los Angeles, Calif.

Gentlemen:

Yesterday I received a letter from Mr. Gage, advising me that at present you would be unable to accept my contracts for Western Electric Sound Projector equipment, for my Coliseum Theatres in Ketchikan and Juneau, Alaska. Today I talked further with Mr. Gage on this subject and it is at his suggestion that I am writing you.

I accepted this equipment with a thought for the future and fully realize the necessity of protecting myself at this time for the future when I expect your Engineering Department will be fully equipped to service equipment in Alaska, which, you gentlemen must realize, is only a short distance from Seattle. For instance, two boats weekly out of Seattle go to Ketchikan, Alaska. The total trip is forty hours and the maximum time from Ketchikan to Juneau is only fourteen hours. Furthermore, the

(Testimony of W. D. Gross.)

entertainment and amusement in Alaska is just as up-to-date as that in the States. Also, the theatres and equipment in the theatres are of the latest and most modern design that money can buy. My investment in the North is equivalent to any individual exhibitor operating a theatre of similar size in the States and I feel I must be protected.

When Mr. Gage sold me this equipment, it was with the distinct understanding that you would establish a service or inspection charge which would be in excess of the regular service charge, but would not be unreasonable. Mr. Gage was unable to give me anything definite but I felt that the reliability of the Company would certainly place the Territory of Alaska on an equal basis with anywhere in the United States, with me willing [270] to make the sacrifice. Therefore, I believe you should protect my April date on installations as I am sure that within a very few months you will have established a definite policy enabling you to take care of my situations along with all others.

After you have made the installations in my theatres, I would be willing to either hire one of your men for each town, permanently, or, if your engineers saw fit, leave my men in charge. We can always, in case of any difficulty, run silent pictures while waiting for a service man to come up from Seattle. I would pay the cost of the man coming and going. I would see to it that the standard of all reproduction of Vitaphone and Movietone subjects

(Testimony of W. D. Gross.)

would never be lowered for want of proper service.

I realize under the circumstances, after talking with Gage, that it is going to take you a little while to advise definitely on the installation. In the meantime, hold the earliest possible dates and cash my checks whenever you desire, notifying me at the earliest possible opportunity as I am anxious to close now for the proper service while I am in Seattle.

Yours very truly,

WDG/mm

(Signed) W. D. GROSS

D. W. Gross,

Atwood Hotel, for two weeks

Seattle, Wash.

after that

W. D. Gross,

Coliseum Theatre,

Juneau, Alaska.”

Whereupon the following proceedings were had:

“Mr. ROBERTSON: I offer that letter in evidence, your Honor.

Mr. HELLENTHAL: Object to that Your Honor, because it is irrelevant, incompetent and immaterial. It was a letter written before the time of the execution of this contract which specifies it contains and embodies all the arrangements and agreements between the parties, and in any event, whatever transpired before that in relation to the subject matter of

(Testimony of W. D. Gross.)

the contract would have merged into the contract even though that express provision had not been in the contract, and the further reason this letter relates to an entirely different and separate contract which has nothing to do with the issues of the case which was entirely revoked when this contract of October 29th was executed.

Mr. ROBERTSON: It isn't offered to vary the terms of any contract. It is for the purpose of showing the circumstances which led up to it. It bears, we think, also, on his affirmative defense of duress and counter-claim of duress, and also his statement that he knew nothing about service charges, and it is proper to impeach the witness with it.

The COURT: The offer will be refused.

Mr. ROBERTSON: Exception, Your Honor.

The COURT: Exception allowed." [271]

Thereupon Defendant Gross further testified: In the late fall of 1928 I had no correspondence with plaintiff relative to the negotiation of the contracts, plaintiff's exhibits Nos. 1 and 3; the letter marked Plaintiff's exhibit No. 32 for identification, was written by my manager, Charles Tuckett, on the letterhead of the Alaska Film Exchange, which is one of the ways in which I did business and it had no bearing to the contracts, plaintiff's exhibits Nos. 1 and 3.

(Testimony of W. D. Gross.)

Thereupon plaintiff offered its

EXHIBIT No. 32

for identification in evidence, which letter reads:

“THE ALASKA FILM EXCHANGE

W. D. Gross, Manager

Largest Exchange North of Seattle

Office Coliseum Theatre Building

Juneau, Alaska.

Dec. 12, 1928.

Electrical Research Products Inc.,

Acoustic Dept.

250 West 57th St.,

New York, N. Y.

Att. Mr. E. S. Gregg, Export Mgr.

Dear Sir:

Your letter of Nov. 23 has just been handed to me. The delay on answering same is because for the last two months I have been in Seattle.

I have noticed your paragraphs numbered one, two and three. As these are just minor conditions and don't amount to very much I will accept them.

I would appreciate it very much if you will advise me, if the machines and engineer come at the same time or whether the engineer comes first and then you ship the machines.

If the machines and the engineer comes at the same time please advise me how much space you

(Testimony of W. D. Gross.)

require in the booth. And just how large the booth has to be as I might have to make some changes in one of my theatres. The booth in my Ketchikan house is about 10 x 20 ft. and just as modern as any house in the states. In Juneau I am afraid that we will have to remodel this booth. So with out fail advise me by return mail just what space you will require so that I will be able to remodel this booth before your engineer arrives.

Also regarding the service charge. I presume by running only one show per night and after your engineer has gone over the situation we will be able to work this out to the advantage of all concerned. He will also find that we have just as good electricians and operators here as they have anywhere [272] he has been. And that he will give me the privilege of using my own service man who is under salary at present.

So therefore kindly sign the contracts and also put my deposit checks thru the bank.

We are also building a new theatre in a town about eighty miles from Juneau, and remodeling another just forty miles from here. I would like to know if you could install your equipment in these theatres at the same time that your engineer is installing mine here in Juneau. If this is impossible how long would it be before I could get installations in either one or both of these towns? The new theatre will be finished about March 15, 1929.

(Testimony of W. D. Gross.)

Thanking you in advance for your co-operation in this and hoping to receive my copys of the contracts and advises I have requested I remain,

Very truly yours,

(Signed) W. D. Gross

WDG:c'

C.W.T.

Whereupon the following proceedings were had:

“Mr. ROBERTSON: Offer it in evidence, if the Court please.

A. (Witness) That was prior to the contract.

Mr. HELLENTHAL: Let me ask the witness a question before this matter is passed on.

Q. (Mr. HELLENTHAL) Mr. Gross, did this letter in any way refer to the contracts made on March 28th, 1929?

A. No.

Mr. HELLENTHAL: Object as incompetent and irrelevant.

Mr. ROBERTSON: It is a matter for re-direct examination.

Mr. HELLENTHAL: No, it bears on the competency of this letter, if it were competent.

Mr. ROBERTSON: I will show it does.

Q. (Mr. HELLENTHAL) Does it?

A. No, it has no bearing on the contract.

Mr. ROBERTSON: I move to strike the latter part of the answer. (Answer read)

(Testimony of W. D. Gross.)

The COURT: That part of it is responsive.

Mr. HELLENTHAL: Object as irrelevant, incompetent and immaterial, and as relating to matters which are all merged into the written contract, especially in view of the provisions of the written contract that that contract embodies all the arguments, understandings and arrangements between the parties at the date of the signature—the 28th of March, 1929, [273] and the further reason that this letter relates to an entirely different and separate contract and has nothing to do with this contract at all.

The COURT: I don't think it is admissible at this time.

Mr. ROBERTSON: Exception."

Thereupon Defendant Gross further testified: I recognize this letter, plaintiff's exhibit No. 33 for identification but I don't know who wrote it, I don't know whether I replied to it or not.

Whereupon the following proceedings took place:

"Mr. ROBERTSON: I offer it in evidence, if the Court please.

Mr. HELLENTHAL: I want to ask a preliminary question.

Q. (Mr. HELLENTHAL) Mr. Gross, does this letter counsel just inquired about relate to the contracts signed on March 28th, 1929 or to some other contract?

A. It doesn't relate to March 29th.

(Testimony of W. D. Gross.)

Q. It does not?

A. No.

Mr. HELLENTHAL: Object as incompetent, irrelevant and immaterial, as not relating to any of the matters in issue—the contract of March 29th, but some other contract, and the further reason the only purpose it could serve would be to modify or introduce extraneous agreements prior to the execution of those contracts which would necessarily merge into the written contract, specifically so because of the express provision in the written contract that there are no agreements or understandings or other matters of that kind that are not embodied in the written contract.

Mr. ROBERTSON: Object to this re-direct examination of the defendant like that and also submit we are not bound by that.

Q. I would like to ask you Mr. Gross at this time whether or not the letter which has been marked plaintiff's exhibit '33' for identification isn't the letter to which you were replying when you wrote this letter plaintiff's exhibit '32' for identification?

A. I didn't write any of them letters.

Q. When Mr. Tuckett wrote the letter '32' for identification and signed your name to it, isn't that in reply to the letter exhibit '33' for identification?

A. I have no idea.

(Testimony of W. D. Gross.)

Q. I ask you to look on the back of '33' for identification and [274] see if the carbon copy isn't attached right there, from your own file?

A. It isn't marked who dictated the letter, and who signed the letter; generally have 'WDG' and the initials of the stenographer next to it.

Q. You don't deny that was written by Mr. Tuckett?

A. I have no idea—if the Tuckett initials is on there why——

Q. You stated before it was written by Mr. Tuckett.

Mr. FAULKNER: I think that is arguing with the witness, and don't think the witness stated that.

Mr. ROBERTSON: I surely have a right to ask if he stated it.

The COURT: Ask him.

Mr. ROBERTSON: I understood him to answer affirmatively.

A. I don't know who signed it.

Q. Now you say you don't know who signed it?

A. No, I don't know who signed it, unless Tuckett.

Q. You told your attorney that these two letters didn't refer to the contracts of March 28th, 1929?

A. Yes, sir.

(Testimony of W. D. Gross.)

Q. What contracts did they refer to, do you claim?

A. They didn't refer to any contract.

Mr. HELLENTHAL: Object as irrelevant, incompetent and immaterial.

The COURT: Overruled. [275]

Q. Mr. Gross, in December, 1928, what, if any, contracts were then in negotiation between you and 'Erpi' other than the contracts which have been introduced in evidence and marked plaintiff's exhibits '1' and '3'?

A. That is the only contract I know of.

Q. Those are the only contracts in negotiation at that time, isn't that true?

A. Yes.

Mr. HELLENTHAL: Did you understand that question?

Mr. ROBERTSON: I submit that he answered it and doesn't need any help of counsel.

Mr. HELLENTHAL: This man is not a very intelligent man. I want to know he understands the questions.

The COURT: I think he understands the questions.

(Last question and answer read)

Q. What is your answer, Mr. Gross?

A. To my recollection.

Q. That is your recollection?

A. There had been previous talk for other machines, higher priced machines.

(Testimony of W. D. Gross.)

Q. Previous to this time?

A. Yes.

Q. No contracts being negotiated for?

A. No sir.

Q. Now, Mr. Gross, you had signed some contracts a considerable time previous to this which had never been accepted, hadn't you?

Mr. HELLENTHAL: Object as incompetent, irrelevant and immaterial.

The COURT: Sustained.

Mr. ROBERTSON: I now offer these two letters in evidence at this time. He definitely stated at that time there were no contracts in negotiation except exhibits '1' and '3'.

Q. (Mr. HELLENTHAL): When was the first time you commenced negotiating with these parties in relation to the contracts which were finally signed March 28th, 1929?

Mr. ROBERTSON: I object at the present time, as out of order and not proper for counsel to propound questions to the witness at this time; he has that right on re-direct examination.

The COURT: I think it would tend to clear up the situation a little, both for the court and the jury. Answer the question. [276]

A. The first time I met Mr. Gage was in 1928.

Mr. HELLENTHAL: You don't understand the question.

(Testimony of W. D. Gross.)

Mr. ROBERTSON: I submit he already answered the question.

The COURT: Let's try and get somewhere.

Q. (Mr. HELLENTHAL): I am asking you about those contracts now in evidence, number 1 and number 3, the contracts signed on March 28th, 1929. Do you understand me now?

A. Yes.

Q. When did you first begin to negotiate for those contracts when was it you first heard of those contracts, the contracts you now have, I mean?

A. Sometime in March of 1929.

Q. Before that did you ever have any correspondence with these parties with reference to those contracts at all?

A. No sir.

Mr. ROBERTSON: Same objection, leading, and interjecting into my cross examination.

The COURT: I don't think it is leading.

Q. (Mr. HELLENTHAL): Did you have any correspondence with the Products Company about these contracts that are now in evidence, the ones you heard from first in February and March, 1929, before February or March, 1929?

A. No."

(Testimony of W. D. Gross.)

Thereupon plaintiff offered in evidence its

EXHIBIT No. 33

for identification, which reads:

“November 23, 1928.

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Mr. Gross:

We are now prepared to agree to ship the equipments for your theatres in Juneau and Ketchikan in April of next year. In order to come to a mutual understanding I feel that you should be advised that certain expenses over and above those included in the domestic prices mentioned in the contracts that you have already signed will be billed to you separately.

1. The expenses of our engineer from the time he leaves Seattle, or other Pacific Coast port, until his return.

2. Any extra expenses over our standard rates which may be incurred due to unusual labor conditions or other causes. Extra expenses of this kind are not anticipated. [277]

3. A weekly service charge somewhat in excess of the one in the States. We will not be able to determine the exact amount of this charge until our engineer can study the local situation. Our desire is to give you service equal to that given to theatres in this country and at all times to keep this charge at a minimum.

(Testimony of W. D. Gross.)

If you will let us know that you agree to the terms of this letter, we will sign and return copies of the contracts to you and will deposit the checks.

If other business develops while our engineer is in Alaska, his expenses will be pro-rated between your two theatres and any others on which he might be used. The expenses of maintaining service would also be pro-rated among all theatres in which we are to make installations.

Yours very truly,

E. W. Gregg

ESG:S

Export Manager.”

Whereupon the following proceedings were had:

“Mr. HELLENTHAL: I make objection to the offer: First: It is of another contract than the basis of the action. Second: It could serve no possible purpose except to introduce into the case a new and special agreement or understanding, and any such agreement or understanding which might have been had, even although of this contract, would be incompetent, irrelevant and immaterial because it would have merged into the written contract, especially in this contract because this contract contains the express provision there are no understandings between the parties except those contained in the contract of March 28th, 1929.

The COURT: It is not admissible at this time. The Court will so rule.

(Testimony of W. D. Gross.)

Mr. ROBERTSON: Exception, if the court please to the refusal of plaintiff's exhibits '31', '32', and '33' for identification."

Prior to their respective offer defendant Gross testified that he wrote the letter, plaintiff's Exhibit 31 for identification, that the Alaska Film Exchange was one of the ways that he did business; that he didn't sign the letter, plaintiff's exhibit 32 for identification; that it was written by Charles Tuckett and Tuckett signed it himself; that he didn't give Tuckett authority to write letters in his business; that it was written prior to the contract; that it didn't refer to or have any bearing on the contract of March 28, 1929, that he recognized the letter, plaintiff's Exhibit [278] 33 for identification; that he didn't know who wrote it; that he didn't know whether or not he replied to the letter of November 23, 1928; that he had no idea whether Tuckett wrote the letter, plaintiff's Exhibit 32 for identification in reply to the letter, Plaintiff's Exhibit 33 for identification; that he didn't know who signed it unless Tuckett did; that neither of those letters referred to the contracts of March 28, 1929, or any contract. [279]

Whereupon the following proceedings were had:

"Mr. ROBERTSON: I would like to ask at this time if counsel have the books we mentioned this morning?

Mr. HELLENTHAL: The books?

Mr. ROBERTSON: Yes.

(Testimony of W. D. Gross.)

Mr. HELLENTHAL: No. We have those books, and will exhibit them to counsel, but we are not going to bring them up here. We will offer them in evidence when the proper time comes, but I don't think counsel can get head or tail of them until the bookkeeper explains them.

Mr. ROBERTSON: We made demand for the production of the books before the trial started, and are entitled to see the books and not wait until the last moment.

Mr. HELLENTHAL: We will give them to you for inspection any time you want.

Mr. ROBERTSON: What time will it be convenient?

Mr. HELLENTHAL: Whenever it suits your convenience, but I suggest you wait until the bookkeeper explains them, so you will know something about them.

Mr. ROBERTSON: We may have just as good bookkeepers as Mr. Gross.

Mr. HELLENTHAL: I have doubts you have a bookkeeper that knows as much about these books as the man that kept them; that is the point I am trying to get at.

Mr. ROBERTSON: That gives us no opportunity to challenge Mr. Gross on his own books.

Mr. HELLENTHAL: Mr. Gross knows nothing about them.

The COURT: That is true. I suppose under the circumstances you can reserve that part

(Testimony of W. D. Gross.)

of the cross-examination until you get possession of the books.

Mr. HELLENTHAL: I will explain to counsel we have made a summary from the books and all the items he is inquiring about, profit and loss, including Shearer, which will be produced in evidence at the proper time and counsel will be given an opportunity to examine the books and check them up.

Mr. ROBERTSON: Of course we want to see the books ourselves and check the summary as shown by the books." [280]

Thereupon Witness Gross further testified: From the time the new Western Electric equipment was put in the Juneau Coliseum Theatre under defendant's arrangement with Shearer, I always made money.

Thereupon defendant produced profit and loss statements under his arrangement with B. F. Shearer, which were then offered in evidence by plaintiff and received and marked as

PLAINTIFF'S EXHIBITS, Series 34-A to 34-Y,
both inclusive, and 35-A to 35-Y,

which respective exhibits contain the following statement of receipts, expenses, profits and losses, viz:

(Testimony of W. D. Gross.)

JUNEAU EMPIRE THEATRES, INC.

Operating Statement—1933.

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
CAPITOL, Juneau. (Exhibit 35-Y)				
May				
	Receipts	\$2,834.30		
	Total expenses	2,447.72	\$ 386.58	
COLISEUM, Juneau. (Exhibit 35-Y)				
May				
	Receipts	\$1,131.40		
	Total expenses	1,181.96	\$ 50.56	
May—Total Profit from Juneau Operations.....				\$ 336.02
CAPITOL, Juneau. (Exhibit 35-Y)				
June				
	Receipts	\$3,758.35		
	Total expenses	3,123.14	\$ 635.21	
COLISEUM, Juneau. (Exhibit 35-Y)				
June				
	Receipts	\$ 451.05		
	Total expenses	615.69	\$ 164.64	
June—Total Profit from Juneau Operations.....				\$ 470.57
CAPITOL, Juneau. (Exhibit 35-Y)				
July				
	Receipts	\$3,686.64		
	Total expenses	3,417.53	\$ 269.11	
COLISEUM, Juneau. (Exhibit 35-Y)				
July				
	Receipts	\$1,580.25		
	Total expenses	1,527.51	\$ 52.74	
July—Total Profit from Juneau Operations.....				\$ 321.85

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
CAPITOL, Juneau. (Exhibit 35-X)				
Aug.				
	Receipts	\$4,250.88		
	Slide Rental	62.50		
		<u> </u>		
		\$4,313.38		
	Total expenses	2,713.54	\$1,599.84	
		<u> </u>		

COLISEUM, Juneau. (Exhibit 34-X)

Aug.				
	Receipts	\$1,472.85		
	Slide Rental	37.50		
		<u> </u>		
		\$1,510.35		
	Total expenses	1,859.77	\$ 349.42	
		<u> </u>		
	Total Profit from August Operations.....			\$1,250.42

CAPITOL, Juneau. (Exhibit 35-U)

Sept.				
	Receipts	\$4,176.59		
	Total expenses	2,849.47	\$1,327.12	
		<u> </u>		

COLISEUM, Juneau. (Exhibit 34-U)

Sept.				
	Receipts	\$1,793.80		
	Total expenses	2,118.53	\$ 324.73	
		<u> </u>		
	Total Profit from September Operations.....			\$1,002.39

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
CAPITOL, Juneau. (Exhibit 35-T)				
Oct.				
	Receipts	\$4,885.17		
	Total expenses	2,981.53	\$1,903.64	
		<hr/>		
COLISEUM, Juneau. (Exhibit 34-T)				
Oct.				
	Receipts	\$1,605.45		
	Total expenses	2,154.94	\$ 549.49	
		<hr/>		
	Total Profit from October Operations.....			\$1,354.15
CAPITOL, Juneau. (Exhibit 35-R)				
Nov.				
	Receipts	\$4,620.88		
	Total expenses	2,906.53	\$1,714.35	
		<hr/>		
COLISEUM, Juneau. (Exhibit 34-R)				
Nov.				
	Receipts	\$1,899.15		
	Total expenses	2,106.21	\$ 207.06	
	Total Profit from November Operations.....			\$1,507.29

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
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CAPITOL, Juneau. (Exhibit 35-O)

Dec.

Receipts	\$3,830.79			
Slide Rentals	60.00			
	<hr/>			
	\$3,890.79			
Total expenses	3,294.93	\$ 595.86		

COLISEUM, Juneau. (Exhibit 34-O)

Dec.

Receipts	\$1,297.10			
Slide Rental	65.00			
Theatre Rental	100.00			
	<hr/>			
	\$1,462.10			
Total expenses	2,021.84	\$ 559.74		
	<hr/>			
Total Profit from December Operations.....		\$ 36.12		

JUNEAU EMPIRE THEATRES, INC.

Operating Statement, 1934

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
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CAPITOL, Juneau. (Exhibit 35-N)

Jan.

Receipts	\$4,337.59			
Total expenses	2,938.70	\$1,398.89		
	<hr/>			

COLISEUM, Juneau. (Exhibit 34-N)

Jan.

Receipts	\$1,727.05			
Total expenses	1,905.10	\$ 178.05		
	<hr/>			
Total Profit from January Operations.....		\$1,220.84		

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
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CAPITOL, Juneau. (Exhibit 35-N)

Feb.

Receipts	\$4,485.14			
Total expenses	2,832.31	\$1,652.83		

COLISEUM, Juneau. (Exhibit 34-N)

Feb.

Receipts	\$1,732.80			
Total expenses	1,864.85		\$ 132.05	
Total Profit from February Operations.....				\$1,520.78

CAPITOL, Juneau. (Exhibit 35-N)

Mar.

Receipts	\$4,415.88			
Total expenses	3,065.15	\$1,350.73		

COLISEUM, Juneau. (Exhibit 34-N)

Mar.

Receipts	\$1,994.60			
Slide Rental	70.00			
	<u>\$2,064.60</u>			
Total expenses	2,384.09		\$ 319.49	
Total Profit from March Operations.....				\$1,031.24

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
CAPITOL, Juneau. (Exhibit 35-N)				
April				
	Receipts	\$4,508.40		
	Slide Rental	25.00		
		<u>\$4,533.40</u>		
	Total expenses	3,175.06	\$1,358.34	
COLISEUM, Juneau. (Exhibit 34-N)				
April				
	Receipts	\$2,287.20		
	Total expenses	2,543.21	\$ 256.01	
		<u></u>		
	Total Profit from April Operations.....			\$1,102.33
CAPITOL, Juneau. (Exhibit 35-I)				
May				
	Receipts	\$3,947.59		
	Total expenses	2,890.98	\$1,056.61	
		<u></u>		
COLISEUM, Juneau. (Exhibit 34-I)				
May				
	Receipts	\$2,229.30		
	Total expenses	2,451.45	\$ 222.15	
		<u></u>		
	Total Profit from May Operations.....			\$ 834.46
CAPITOL, Juneau. (Exhibit 35-I)				
June				
	Receipts	\$4,199.98		
	Total expenses	2,792.65	\$1,407.33	
		<u></u>		
COLISEUM, Juneau. (Exhibit 34-I)				
June				
	Receipts	\$2,120.90		
	Total expenses	2,858.28	\$ 737.38	
		<u></u>		
	Total Profit from June Operations.....			\$ 669.95

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
CAPITOL, Juneau. (Exhibit 35-I)				
July				
	Receipts	\$4,821.92		
	Total expenses	3,177.43	\$1,644.49	
COLISEUM, Juneau. (Exhibit 34-I)				
July				
	Receipts	\$2,224.65		
	Total expenses	2,701.31	\$ 476.66	
	Total Profit from July Operations.....			\$1,167.83
				[284]
CAPITOL, Juneau. (Exhibit 35-D)				
Aug.				
	Receipts	\$5,134.85		
	Total expenses	3,369.00	\$1,765.85	
COLISEUM, Juneau. (Exhibit 34-C)				
Aug.				
	Receipts	\$2,404.60		
	Slide Rental	140.00		
		\$2,544.60		
	Total expenses	2,614.41	\$ 69.81	
	Total Profit from August Operations.....			\$1,696.04
CAPITOL, Juneau. (Exhibit 35-D)				
Sept.				
	Receipts	\$4,908.21		
	Total expenses	3,336.21	\$1,572.00	
COLISEUM, Juneau. (Exhibit 34-C)				
Sept.				
	Receipts	\$2,919.15		
	Total expenses	2,745.63	173.52	
	Total Profit from September Operations.....			\$1,745.52

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
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CAPITOL, Juneau. (Exhibit 35-D)

Oct.

Receipts	\$4,584.17			
Total expenses	3,224.83	\$1,359.34		

COLISEUM, Juneau. (Exhibit 34-C)

Oct.

Receipts	\$2,104.35			
Total expenses	2,604.13		\$ 499.78	

Total Profit from October Operations.....				\$ 859.56
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CAPITOL, Juneau. (Exhibit 35-B)

Nov.

Receipts	\$4,208.10			
Slide Rental	1.36			
	<u>\$4,209.46</u>			
Total expenses	3,006.88	\$1,202.58		

COLISEUM, Juneau. (Exhibit 34-A)

Nov.

Receipts	\$2,317.95			
Total expenses	2,668.45		\$ 350.50	

Total Profit from November Operations.....				\$ 852.08
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(Testimony of W. D. Gross.)

ALASKA EMPIRE THEATRES, INC.

Operating Statement, 1933.

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
REVILLA, Ketchikan. (Exhibit 34-Y)				
May				
	Receipts	\$1,926.10		
	Total expenses	1,504.07	\$ 422.03	
COLISEUM, Ketchikan. (Exhibit 34-Y)				
May				
	Receipts	\$ 85.60		
	Total expenses	289.28	\$ 203.68	
LIBERTY, Ketchikan. (Exhibit 34-Y)				
May				
	Receipts	\$ —		
	Total expenses	108.53	\$ 108.53	
	Total Profit from May Operations.....			\$ 109.82
REVILLA, Ketchikan. (Exhibit 34-Y)				
June				
	Receipts	\$2,526.32		
	Slide Rental	13.75		
		\$2,540.07		
	Total expenses	1,842.65	\$ 697.42	
COLISEUM, Ketchikan. (Exhibit 34-Y)				
June				
	Receipts	\$ 2.50		
	Total expenses	346.29	\$ 343.79	
LIBERTY, Ketchikan. (Exhibit 34-Y)				
June				
	Receipts	\$ —		
	Total expenses	105.85	\$ 105.85	
	Total Profit from June Operations.....			\$ 247.78

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
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REVILLA, Ketchikan. (Exhibit 34-Y)

July

Receipts	\$2,630.44			
Slide Rental	15.00			
	<u> </u>			
	\$2,645.44			
Total expenses	2,009.36	\$ 636.08		
	<u> </u>			

COLISEUM, Ketchikan. (Exhibit 34-Y)

July

Receipts	\$1,142.78			
Total expenses	964.84	\$ 177.94		
	<u> </u>			

LIBERTY, Ketchikan. (Exhibit 34-Y)

July

Receipts	\$ —			
Total expenses	101.37	\$ 101.37		
	<u> </u>			

Total Profit from July Operations.....\$ 712.65

Total Profit from May, June and July Operations.....\$1,070.25

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
REVILLA, Ketchikan. (Exhibit 35-W)				
Aug.				
	Receipts	\$2,623.30		
	Slide Rental	23.75		
		<u>\$2,647.05</u>		
	Total expenses	1,757.60	\$ 889.45	
COLISEUM, Ketchikan. (Exhibit 34-W)				
Aug.				
	Receipts	\$ 988.23		
	Rental on Bldg.....	85.00		
		<u>\$1,073.23</u>		
	Total expenses	1,134.15	\$ 60.92	
LIBERTY, Ketchikan. (Exhibit 34-W)				
Aug.				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<u> </u>		
	Total Profit from August Operations.....			\$ 728.53
REVILLA, Ketchikan. (Exhibit 35-V)				
Sept.				
	Receipts	\$2,326.44		
	Total expenses	1,578.69	\$ 747.75	
		<u> </u>		
COLISEUM, Ketchikan. (Exhibit 34-V)				
Sept.				
	Receipts	\$2,397.82		
	Total expenses	1,541.33	\$ 856.49	
		<u> </u>		
LIBERTY, Ketchikan. (Exhibit 34-V)				
Sept.				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<u> </u>		
	Total Profit from September Operations.....			\$1,504.24

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
REVILLA, Ketchikan. (Exhibit 35-S)				
Oct.				
	Receipts	\$1,435.29		
	Slide Rental	25.00		
		<hr/>		
		\$1,460.29		
	Total expenses	1,739.03	\$ 278.74	

COLISEUM, Ketchikan. (Exhibit 34-S)

Oct.				
	Receipts	\$2,369.90		
	Slide Rental	2.00		
		<hr/>		
		\$2,371.90		
	Total expenses	2,129.78	\$ 242.12	

LIBERTY, Ketchikan. (Exhibit 34-S)

Oct.				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<hr/>		
	Total Loss from October Operations.....			\$ 136.62

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
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REVILLA, Ketchikan. (Exhibit 35-Q)

Nov.

Receipts	\$1,431.08			
Slide Rental	24.00			
	<u> </u>			
	\$1,455.08			
Total expenses	1,443.31	\$	11.77	
	<u> </u>			

COLISEUM, Ketchikan. (Exhibit 34-Q)

Nov.

Receipts	\$1,858.30			
Slide rentals	5.00			
	<u> </u>			
	\$1,863.30			
Total expenses	1,547.61	\$	315.69	
	<u> </u>			

LIBERTY, Ketchikan. (Exhibit 34-Q)

Nov.

Receipts	\$	—		
Total expenses	100.00		\$	100.00
	<u> </u>			
Total Profit from November Operations.....			\$	227.46

REVILLA, Ketchikan. (Exhibit 35-P)

Dec.

Receipts	\$1,870.61			
Slide Rentals	14.60			
	<u> </u>			
	\$1,884.61			
Total expenses	1,864.32	\$	20.29	
	<u> </u>			

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
<hr/>				
COLISEUM, Ketchikan. (Exhibit 34-P)				
Dec.				
	Receipts	\$ 666.71		
	Total expenses	1,081.63	\$ 414.92	
		<hr/>		
LIBERTY, Ketchikan. (Exhibit 34-P)				
Dec.				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<hr/>		
	Total Loss from December Operations.....			\$ 494.63
				[288]

REVILLA, Ketchikan. (Exhibit 35-M)

Jan.				
	Receipts	\$2,156.90		
	Slide Rental	57.50		
		<hr/>		
		\$2,214.40		
	Total expenses	1,941.15	\$ 273.25	
		<hr/>		

COLISEUM, Ketchikan. (Exhibit 34-M)

Jan.				
	Receipts	\$ 876.30		
	Total expenses	984.48	\$ 108.18	
		<hr/>		

LIBERTY, Ketchikan. (Exhibit 34-M)

Jan.				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<hr/>		
	Total Profit from January Operations.....			\$ 65.07

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
REVILLA, Ketchikan. (Exhibit 35-M)				
Feb.				
	Receipts	\$2,163.38		
	Slide Rental	25.00		
		<u>\$2,188.38</u>		
	Total expenses	1,686.65	\$ 501.73	
COLISEUM, Ketchikan. (Exhibit 34-M)				
Feb.				
	Receipts	\$1,258.61		
	Total expenses	1,144.24	\$ 114.37	
LIBERTY, Ketchikan. (Exhibit 34-M)				
Feb.				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<u>100.00</u>		
	Total Profit from February Operations.....			\$ 516.10
REVILLA, Ketchikan. (Exhibit 35-M)				
Mar.				
	Receipts	\$1,611.05		
	Slide Rental	20.00		
		<u>\$1,631.05</u>		
	Total expenses	1,708.36	\$ 77.31	
COLISEUM, Ketchikan. (Exhibit 34-M)				
Mar.				
	Receipts	\$2,811.61		
	Total expenses	2,032.64	\$ 778.97	
LIBERTY, Ketchikan. (Exhibit 34-M)				
Mar.				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<u>100.00</u>		
	Total Profit from March Operations.....			\$ 601.66

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
REVILLA, Ketchikan. (Exhibit 35-M)				
April				
	Receipts	\$1,514.58		
	Slide Rental	31.00		
		<u>1,545.58</u>		
	Total expenses	1,842.19	\$ 296.61	
COLISEUM, Ketchikan. (Exhibit 34-M)				
April				
	Receipts	\$2,321.30		
	Slide Rental	6.50		
		<u>2,327.80</u>		
	Total expenses	1,856.89	\$ 470.91	
LIBERTY, Ketchikan. (Exhibit 34-M)				
April				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<u>100.00</u>		
	Total Profit from April Operations.....			\$ 74.30
REVILLA, Ketchikan. (Exhibit 35-J)				
May				
	Receipts	\$1,633.19		
	Slide Rental	30.00		
		<u>1,663.19</u>		
	Total expenses	1,760.48	\$ 97.29	
COLISEUM, Ketchikan. (Exhibit 34-J)				
May				
	Receipts	\$2,696.05		
	Total expenses	1,857.91	\$ 838.14	
		<u>1,857.91</u>		
LIBERTY, Ketchikan. (Exhibit 34-J)				
May				
	Receipts	\$ —		
	Total expenses	100.00	\$ 100.00	
		<u>100.00</u>		
	Total Profit from May Operations.....			\$ 640.85

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
REVILLA, Ketchikan. (Exhibit 35-J)				
June				
	Receipts	\$1,659.51		
	Slide Rental	20.00		
		<u>\$1,679.51</u>		
	Total expenses	1,728.57	\$ 49.06	

COLISEUM, Ketchikan. (Exhibit 34-J)

June

Receipts	\$2,491.02		
Slide Rental	2.00		
	<u>\$2,493.02</u>		
Total expenses	2,112.82	\$ 380.20	

LIBERTY, Ketchikan. (Exhibit 34-J)

June

Receipts	\$ —		
Total expenses	100.00	\$ 100.00	
	<u>100.00</u>		
Total Profit from June Operations.....			\$ 231.14

[290]

REVILLA, Ketchikan. (Exhibit 35-J)

July

Receipts	\$2,068.78		
Slide Rental	25.00		
	<u>\$2,093.78</u>		
Total expenses	1,948.92	\$ 144.86	

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
COLISEUM, Ketchikan. (Exhibit 34-J)				
July				
Receipts	\$3,353.64			
Total expenses	2,312.00	\$1,041.64		
LIBERTY, Ketchikan. (Exhibit 34-J)				
July				
Receipts	\$ —			
Total expenses	100.00		\$ 100.00	
Total Profit from July Operations				\$1,086.50
REVILLA, Ketchikan. (Exhibit 35-C)				
Aug.				
Receipts	\$2,003.24			
Slide Rental	52.50			
	\$2,055.74			
Total expenses	1,998.77	\$ 56.97		
COLISEUM, Ketchikan. (Exhibit 34-D)				
Aug.				
Receipts	\$3,256.87			
Total expenses	2,034.11	\$1,222.76		
LIBERTY, Ketchikan. (Exhibit 34-D)				
Aug.				
Receipts	\$ —			
Total expenses	20.70		\$ 20.70	
Total Profit from August Operations				\$1,259.03

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
REVILLA, Ketchikan. (Exhibit 35-C)				
Sept.				
	Receipts	\$2,790.20		
	Slide Rental	97.60		
		<hr/>		
		\$2,887.80		
	Total expenses	1,941.88	\$ 945.92	
		<hr/>		
COLISEUM, Ketchikan. (Exhibit 34-D)				
Sept.				
	Receipts	\$3,941.55		
	Slide Rental	150.00		
		<hr/>		
		\$4,091.55		
	Total expenses	2,293.59	\$1,797.96	
		<hr/>		
LIBERTY, Ketchikan. (Exhibit 34-D)				
Sept.				
	Receipts	\$ —		
	Total expenses	—		
		<hr/>		
	Total Profit from September Operations.....			\$2,743.88

[291]

REVILLA, Ketchikan. (Exhibit 35-C)				
Oct.				
	Receipts	\$2,048.92		
	Slide Rental	73.70		
		<hr/>		
		\$2,122.42		
	Total expenses	1,995.21	\$ 127.21	
		<hr/>		
COLISEUM, Ketchikan. (Exhibit 34-D)				
Oct.				
	Receipts	\$3,812.24		
	Total expenses	2,190.48	\$1,621.76	
		<hr/>		

(Testimony of W. D. Gross.)

Month	Receipts or Total Expenses	Profits	Losses	Total Profits
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LIBERTY, Ketchikan. (Exhibit 34-D)

Oct.

Receipts\$ ——

Total expenses ——

Total Profit from October Operations.....\$1,748.97

REVILLA, Ketchikan. (Exhibit 35-A)

Nov.

Receipts\$1,891.60

Other income 72.50

—————
\$1,964.10

Total expenses 1,884.54 \$ 79.56

COLISEUM, Ketchikan. (Exhibit 34-B)

Nov.

Receipts\$3,481.15

Other income 200.00

—————
\$3,681.15

Total expenses 2,125.83 \$1,555.32

Total Profit from November Operations.....\$1,634.88

(Testimony of W. D. Gross.)

The foregoing statements of receipts, expenses, profits and losses are repeated in the remainder of the plaintiff's exhibits Series 34 and 35 for the following respective times, viz:

Exhibit 35-E, Capitol, Juneau, July, August and Sept. 1934

Exhibit 34-E, Coliseum, Juneau, July, August and September, 1934

Exhibit 34-F, Coliseum, Ketchikan, July, August and Sept. 1934

Exhibit 35-F, Revilla and Liberty, Ketchikan, July, August and Sept. 1934

Exhibit 35-G, Revilla, Ketchikan, June, July, August 1934

Exhibit 34-G, Coliseum, and Liberty, Ketchikan, June, July, and August, 1934

Exhibit 34-H, Coliseum, Juneau, June, July, and August, 1934

Exhibit 35-H, Capitol, Juneau, June, July, and August, 1934

Exhibit 34-K, Coliseum, and Liberty, Ketchikan, March, April, and May, 1934

Exhibit 35-K, Revilla, Ketchikan, March, April, and May, 1934

Exhibit 35-L, Capitol, Juneau, March, April, and May, 1934

Exhibit 34-L, Coliseum, Juneau, March, April, and May, 1934

therefore, as it would simply be repetition, plaintiff's exhibits 34-E, 34-F, 34-G, 34-H, 34-K, 34-L,

(Testimony of W. D. Gross.)

35-E, 35-F, 35-G, 35-H, 35-K, and 35-L, are not copied herein. [292]

Thereupon Defendant Gross further testified: Of the profits or losses made under my arrangement with Shearer I received as my share 40% of those made in Juneau, and 33-1/3% of those made in Ketchikan.

Whereupon the following proceedings were had:

“Q. Mr. Gross, yesterday in reply to Mr. Hellenthal’s question ‘When were those first contracts’ When did you first begin to negotiate for those contracts—when was it you first heard of those contracts,—the contracts you now have, I mean, you said, ‘Sometime in March, 1929’—is that correct?

A. Yes sir.

Q. Now, Mr. Gross, as a matter of fact the payments upon these two equipments were made—the first payments—were made long before that, were they not?

A. Not what I remember.

Q. Now, Mr. Gross, I hand you these two checks, from your defendant’s exhibit ‘F-8’ and ask you to look at them and note the date please.

A. Yes.

Q. Now, those two checks were your first payments, as a matter of fact upon plaintiff’s contracts ‘1’ and ‘3’, is that not true?

A. No.

(Testimony of W. D. Gross.)

Q. Do you mean to say that those checks weren't applied to payments upon the contracts '1' and '3'?

A. Was after applied to it, but the contract was cancelled, absolutely until they sent in the original contract.

Q. But those checks which you drew on that date,—what is the date of the check?

A. July 28th, '28.

Q. Were the checks which were used as original payments on the contracts '1' and '3', is that not true?

A. No.

Q. Do you understand the question?

A. I do.

Q. Weren't those checks applied upon the payments on your contracts '1' and '3'?

A. Not on the March contract.

Q. You testified yesterday that these checks were the checks you made payment on these contracts?

A. These checks were left in their possession as a deposit, any time they got ready they would send the equipment. [293]

Q. These were used as a down payment on your contracts '1' and '3'?

A. Yes, that is correct.

Q. Those were the checks dated Juneau, Alaska, July 28th, 1928, one drawn on the B. M. Behrends Bank in favor of Electrical Re-

(Testimony of W. D. Gross.)

search Products, Incorporated, for \$1130.00 signed, 'Coliseum Theatre, Juneau, W. D. Gross, Manager,' and the other dated, Ketchikan, Alaska, July 28th, 1928, drawn on the Miners & Merchants Bank, Ketchikan, Ketchikan, Alaska, to the order of the Electrical Research Products Company, Incorporated, for \$1130.00 signed, 'Coliseum Theatre, Juneau, by W. D. Gross, Manager'; those are the two checks you are now referring to?

A. Yes sir."

Thereupon defendant Gross further testified: The letter dated February 7, 1929, to me from plaintiff by Gregg, is the original letter with which plaintiff returned to me those two original contracts, plaintiff's Nos. 1 and 3.

Thereupon plaintiff's letter dated February 7, 1929, to defendant, was received in evidence, the Court stating that it might be received as going only to prove defendant's credibility, and marked

PLAINTIFF'S EXHIBIT No. 36,

which reads:

February 7th, 1929.

Mr. W. D. Gross,
The Alaska Film Exchange,
Coliseum Theatre Bldg.,
Juneau, Alaska.

Dear Mr. Gross:

I have your letter of January 22nd, which requests the cancellation of Non-Synchronous and

(Testimony of W. D. Gross.)

Microphone Attachments on your orders for the Ketchikan and Juneau, Alaska Theatres. In accordance with this request, I have had re-drawn the enclosed contracts for those two theatres, indicating a charge of \$10,500 each instead of the previous charge of \$11,300. The demand and monthly notes payable on these contracts have been changed accordingly and are also enclosed.

The down payments of \$1,130 on each contract previously made are being applied on the revised contracts. The latter require a down payment of \$1,050; the difference of \$80.00 is credited in the demand notes (usually 15% of the contract), but in this case reduced from \$1,575 to \$1,495 each. In each case the twelve monthly payment notes are now \$656.25, covering a balance of \$7,875 on each agreement.

Please find enclosed also the contract for the Coliseum Theatre at Petersburg. Please note that this contract excludes the Non-Synchronous and Microphone Attachments. We have not entered the owner's name at the top of the agreement, leaving this blank until you have indicated by the signature whether you or Mr. Enge individually, or both of you as a partnership, are to be the signatories.

Kindly sign all three copies of these three [294] contracts and all the notes attached to each, returning them promptly for final signing along with your checks for the amount of \$1,050 or 10%, payable on the Coliseum, Petersburg, contract. [295]

(Testimony of W. D. Gross.)

If Mr. Enge is to sign the contract for the Petersburg Theatre, please have him fill in the attached credit application form and return it to us for our records.

With the execution of these contracts, we shall return as cancelled the original contracts and notes signed by you on your theatres at Ketchikan and Juneau.

Your letter of January 22nd, requested contracts on the 3S Equipment for the theatres up to eight hundred seats. I am enclosing two contracts made up with blanks for the entry of the name and location of the theatres, on this type of equipment, for your signature, together with the appropriate notes, but at this time, I am unable to promise you an installation of this type until after July 1st, since the equipments will not be available from the factory before about June 1st.

Very truly yours,

HBA:AS
encl.

(Signed) E. S. GREGG.

Thereupon Defendant Gross further testified: I received plaintiff's letter, dated February 14, 1929

Whereupon plaintiff's letter to defendant dated February 14, 1929, was received in evidence, the Court stating that it might be admitted only as going to prove the credibility of the witness, and marked

(Testimony of W. D. Gross.)

PLAINTIFF'S EXHIBIT No. 36-A,

which letter reads:

February 14th, 1929.

Mr. W. D. Gross

The Alaska Film Exchange,
Coliseum Theatre Bldg.,
Juneau, Alaska.

Dear Mr. Gross:

Answering yours of February 4th which refers to my letter of January 22nd, I have already mailed, under date of February 7th, revised contracts for Ketchikan and Juneau, excluding the Non-Synchronous and Microphone Attachments, as well as three contracts for signatures, one on a 2S-41 Equipment for Petersburg and two contracts in blank for the 3S Equipment which will not be available for installation until after July 1st.

If it is your intention to use a 3S Equipment in the Petersburg theatre rather than the 2S-41 for which we have sent you a contract, you may return unsigned the 2S-41 contract and use one of the two 3S contracts.

Regarding the shipping schedule for the Ketchikan equipment, the late availability of this equipment from the factory makes it impossible to catch the April 6th boat from Seattle; consequently, as I said in my letter of January 22nd, we shall attempt to make the April 13th boat, but even that date will require very quick scheduling between its release from the warehouse on or about April 1st and the sailing date April 13th. Under the circumstances,

(Testimony of W. D. Gross.)

this is the best we can do, but it is after all only one week later, and perhaps the installation engineer may be able to make up part of that loss in getting the equipment installed promptly. [296]

I shall pass on word to the installation engineer that you will be in Seattle either at the Atwood Hotel or on the film row sometime around the shipping date.

Very truly yours,

HBS:AS

E. S. Gregg.

Thereupon Defendant Gross further testified: I signed the letter dated January 22, 1929, to plaintiff.

Thereupon defendant's letter to plaintiff dated January 22, 1929, was received in evidence, the Court stating that it might be received for the purpose only of testing the witness' credibility, and marked

PLAINTIFF'S EXHIBIT No. 36-B,

and reads:

Jan. 22, 1929

Electrical Research Products

New York, N Y

Att: Mr. Gregg.

Dear Sir:

Owing to the fact that all the picture companys are now making all talking, part talking and sound pictures.

(Testimony of W. D. Gross.)

I would appreciate it very much if you would be so kind as to cancel the following attachments from my installations.

The Non-synchronous attachment

The Megaphone attachment

It will be impossible for me to use either one of these attachments on the two machines that you are going to install for me in my Ketchikan, and Juneau, Theatres.

Just ship the Vitaphone and Movietone equipment and leave the non synchronous and megaphone attachments out.

The extra money that I paid on the first payment you can credit this to me and when your representative comes he can deduct same from the second or third note that becomes due. Or whichever way it will be the most convenient for you to handle.

Also would it be possible, while your men are here to install your new \$7000.00 installation in a couple of my towns.

You had better forward a couple or three contracts on these new installations as I have some prospects for the Vitaphone and Movitone equipment under this new price.

Hoping that it will not inconvenient you to any great extent and that I will hear from you by return mail on this matter I remain

Very truly yours,

S.D.G.c.

(Signed) W. D. GROSS. [297]

(Testimony of W. D. Gross.)

Thereupon defendant Gross further testified: My signature is at the bottom of the letter dated February 4, 1929, addressed to plaintiff.

Thereupon defendant's letter to plaintiff dated February 4, 1929, was marked

PLAINTIFF'S EXHIBIT No. 36-C

for identification, and was offered in evidence by plaintiff, which letter reads:

Feb. 4, 1929

Electrical Research Products Inc.,

New York, N. Y.

Att: Mr. Gregg.

Your letter of Jan. 22, 1929, received and also the completely executed contracts.

I noticed what you say in regards to it being impossible for me to get my equipment so that it will be able to catch the boat that leaves Seattle, on April 6th.

My idea is that at present and under the conditions we have to count on every day as my competitors might get enough money together and buy one of the cheap outfits that are now on the market. And put same in before I can get mine installed.

My desire is to make this a success and to give my public the best before this cheaper equipment is installed.

Also the Alaska Legislature will be in session the last of March to the first of May. During this session we have here people from the far north.

(Testimony of W. D. Gross.)

And to some of them this will be the only chance that they will ever get to hear the Vitaphone and Movitone. Also these months are my best months as we have a lot of outside people in town.

The few days earlier that I am asking for will do me more good than I can ever explain in letters

So therefore I would appreciate it very much if you will do all you can to get me this installation at the dates that I requested of you.

I will also be in Seattle, when you ship this equipment and I will wait there until your engineer goes to Ketchikan. At that time I will go with him. He will be able to locate me either on the film row or at the Atwood Hotel, Seattle, Wash.

I also want to mention again about the cancelling of the Non-Synchronous and Microphone attachments.

I had no business to contract for these in the first place. Also your agent Mr. Gage did not realize that I have \$18000.00 tied up in organs in my houses. So therefore I would appreciate it if you would be so kind as to cancel these two attachments.

If I have to use silent pictures, and there is no doubt but what I will. I will use the organ instead of the Non-Synchronous as this has been ruined already by a cheap [298] installation in both Ketchikan and Juneau. Also I know that I will not be able to give the satisfaction with the Non-Synchronous for silent pictures as I could with the organ.

(Testimony of W. D. Gross.)

In regards to the contracts for Vitaphone and Movitone for Petersburg, and Wrangell. Make the contracts out for you new and \$7000.00 equipment.

Hoping you will see your way clear to ship my installations on the dates that I requested and also I wish to thank you for your co-operation in all this I remain,

Very truly yours,

WDG/e

Signed: W. D. GROSS.

Whereupon the following proceedings took place:

“Mr. HELLENTHAL: This letter I also object to as incompetent, irrelevant and immaterial, as relating to negotiations that lead up to the execution of the contract into which all the previous negotiations have merged, especially so in view of the fact that the contract specifically provides,—speaking of contract I mean the contracts of March 28th, 1929, specifically provided that there are no other agreements between the parties other than those embodied in the contract, specially as to the subject matter, either express or implied.

Mr. ROBERTSON: We again submit it goes at least to the credibility of the witness.

The COURT: The offer will be denied. We are going clear back into ancient history.

Mr. ROBERTSON: Object to the rejection in evidence of plaintiff's exhibit 36-C for iden-

(Testimony of W. D. Gross.)

tification, being a letter dated February 4, 1929, at least to test the credibility of the witness.

The COURT: Exception allowed. The letter shows on its face it has no reference to these contracts.”

Thereupon Defendant Gross further testified: Plaintiff's letter to me dated January 22, 1929, is the reply that I received from plaintiff to my letter to it of January 6, 1929 for identification.

Whereupon plaintiff offered in evidence defendant's letter marked January 6, 1929, plaintiff's exhibit 36-D for identification, and plaintiff's letter January 22, 1929, marked plaintiff's exhibit No. 36-E for identification, which letters respectively read: [299]

EXHIBIT No. 36-D

Jan. 6, 1929

Electrical Research Products Inc.,
250 West 57th St.,
New York, N. Y.

Mr. E. S. Gregg.

Dear Mr. Gregg:

I received your registered letter of Dec. 29. Also the notes and checks which you enclosed and which I signed and left with your agent in Seattle. [300] I also noticed where you stated that your agent made a mistake on one of the notes. Which was for \$1130.00 and it should of been \$1698.00.

I am signing the notes that you sent and am forwarding same to you by registered mail today.

(Testimony of W. D. Gross.)

You will also note that I have changed the bank's name on the Ketchikan note to read for the bank here in Juneau. I have decided to handle these first two payments thru the B. M. Behrends Bank of Juneau, Alaska. As I will be here at the time that they are presented.

I also noticed what you say in regards to the date that you are going to ship the machines. The one to Ketchikan, on April 13 and the one to Juneau, ten days later which will make it the 23.

The only thing that I would like to request Mr. Gregg, is that you will send the first equipment to Ketchikan a little before this time. I would like very much if you would see that the equipment for Ketchikan, is in Seattle so that it can be shipped on the Alaska Steamship Co. boat that leaves Seattle, on April 6th. As my business in this time opens up around the fifteenth of April and by May first everything is going full blast. It stays that way for the season. By doing this I will be able to open up with your equipment on the opening of the season which is April the fifteenth.

The installation for Juneau, will have to be in Seattle, so that it will have time to catch the boat that leaves there on April 13th. Also be very sure and send everything by the Alaska Steamship Co. boats.

I want to be very sure of these dates and I would appreciate it very much if you would try and accommodate in regards to the above change of dates.

(Testimony of W. D. Gross.)

I will be in Seattle, around the 18 of March and I must have this confirmation so that I will be able to set my bookings. Also I will wait there until your engineer and installations arrive and go to Ketchikan with them. I will stay in Ketchikan, during the time that he is installing the machines there and will then come to Juneau with him. My address while I am in Seattle is The Atwood Hotel, or Warner Brothers Film Exchange. These of these two places will be able to tell your man where he can find me at any time.

So therefore kindly keep these dates before you and advise me when you return the contracts if they will be satisfactory and that I can depend on them.

The house in Ketchikan is as follows. Length 120 ft. Stage 16 ft. leaving house itself 104 ft. clear 50 ft. wide and 36 ft. high. Projection room is on the lower floor. The same as the Blue Mouse in Seattle, and is much larger than your requirements. 2 Simplex machines Peerless Arcs run either off a motor generator or mercury Arc. Projection throw 64 ft. Balcony over the booth and seats around 400.

The house in Juneau, length 110 ft stage 14 ft leaving house itself 96 ft 57 ft wide 19 ft height. Booth in balcony (I am remodeling Booth according your instructions) projection throw 67 ft two simplex machines equipt with Peerless Arc and will run either of the mercury rectifier or motor generator. [301]

(Testimony of W. D. Gross.)

I am hoping that this letter will furnish you with all the data and information that you require and if by chance you should need more I would be more than glad to co-operate with you in any way that I can.

We are going ahead and remodel the Booth in the Juneau house so that there will be no delay what so ever when your engineer is ready for same.

I am hoping to receive a reply by return mail and also that you will be able to ship as per my request. Also that everything is now settled and that I can go ahead and make the arrangements that I have been holding up on.

Thanking you for your co-operation in this matter I remain,

Very truly yours,

Signed: W. D. GROSS

P. S.

In regards to the other house that I requested a installation for. It is the Coliseum Theatre, Petersburg, Alaska. Mr. Enge.

Kindly make out contracts for this house and forward same to me here in Juneau. I will then forward them to Mr. Enge and have him sign same and send you a check for the deposit. Also make out all your notes, but leave the bank's name out so that I will be able to insert the bank's name that I want to handle these payments.

The house is as follows: length 110 ft stage 16 ft width 43 ft height 19 ft two new Simplex Machines

(Testimony of W. D. Gross.)

Peerless Are working off either mercury arc or generators and has a seating of about 550. A. C. Current 110 volts 60 Cycles.

He wants the same installation that I am going to put in.

In regards to the other house I will have to let you know when I am in Seattle. As I have to find out about the service for these houses. As if the prices are too high it will be unable to handle at this time as this town has nothing to draw from. Anyway I will advise you upon my arrival in Seattle in regards to this one.

ALSO WITHOUT FAIL KINDLY INSURE ALL THE EQUIPMENT THAT YOU SEND ON THE ALASKA STEAMSHIP CO.'S BOATS. ONLY INSURE FOR THE TIME IT IS ON THE BOATS.

EXHIBIT 36-E

January 22, 1929

MR. W. D. GROSS,

The Alaska Film Exchange,

Coliseum Theatre Bldg.,

Juneau, Alaska

Dear Mr. Gross:

In acknowledging your letter of January 6th which gives details concerning the two theatres to be equipped with sound reproducing apparatus at Ketchikan and Juneau, Alaska, I enclose your copies of the contracts, completely executed.

(Testimony of W. D. Gross.)

You have requested that the shipment for Ketchikan be made early enough to catch that Alaska Steamship Company's boat on April 6th and that for Juneau to make the sailing on the 13th from Seattle. [302] Our allotments of equipment from the warehouse will not be available until the first of April and since the time for transcontinental shipment is around fifteen days, it will not be possible to send the Ketchikan equipment on the April 6th boat from Seattle. There is a possibility, however, that this first shipment can catch the April 13th boat from Seattle and until we hear further from you, we shall schedule it for that shipment date.

I am having the contracts drawn up for the Coliseum Theatre at Petersburg, Alaska, which you say you will forward to Mr. Enge for signature. These contracts, together with the appropriate notes (leaving blank the space for the bank's name) will be sent to you in an early mail.

Very truly yours,

HBA:AS

Signed: E. S. GREGG.

Enc.

Whereupon the following proceedings took place:

Mr. HELLENTHAL: Your Honor, I will object to it as irrelevant, incompetent and immaterial, as being a matter relating to the installation of the machinery and the negotiations that were had would merge in the written contract, expressly so in view of the fact these particular contracts embody the provision that

(Testimony of W. D. Gross.)

there are no amendments, agreements and understandings between the parties other than those expressed in the contract, either implied or expressed.

The COURT: Both seem to be marked now as exhibits.

Mr. FAULKNER: It was offered yesterday Your Honor.

The COURT: Both for identification?

Mr. ROBERTSON: Yes.

The COURT: The offer will be refused.

Mr. ROBERTSON: Take an exception, Your Honor.

The COURT: In order to save a lot of time the court is not going to receive any correspondence here, including the letter which was received there of February 7th, if my recollection is right—

Mr. ROBERTSON: But I submit I have a right to make my offer so as to preserve my record on it. I take exception to the Court's ruling, refusing to admit in evidence plaintiff's exhibit "36-D" for identification letter dated January 6, 1929, and letter dated January 22, 1929 marked plaintiff's exhibit 36-E for identification. [303] And also to the Court's refusal to admit in evidence letter dated February 4, 1929 marked for identification plaintiff's exhibit "36".

Thereupon Defendant Gross further testified: I don't remember if I was here or not, but I pre-

(Testimony of W. D. Gross.)

sume this telegram dated January 29, 1930, was received by my manager, if I didn't receive it.

Thereupon said telegram was received in evidence marked

PLAINTIFF'S EXHIBIT No. 37,

and reads:

1/29/30

W. D. Gross
c/o Coliseum Theatre
Juneau Alaska

According our records your account in arrears as follows Coliseum Juneau four weeks billings plus merchandise items total hundred fifty nine dollars forty cents Coliseum Ketchikan four weeks billings plus merchandise total two hundred ten dollars twelve cents forward check by return mail to cover wire confirmation.

R. H. Pearsall
Electrical Research Products Inc.

46 words, charge Electrical Research Products Inc.
night letter
RHP/HH

Thereupon Defendant Gross further testified: The letter to me from plaintiff dated January 30, 1930, was received and my manager will testify to it.

Thereupon plaintiff's said letter to defendant was received in evidence, marked

(Testimony of W. D. Gross.)

PLAINTIFF'S EXHIBIT No. 37-A

and reads:

January 30, 1930

Mr. W. D. Gross
 c/o Coliseum Theatre
 Juneau, Alaska

Re: Coliseum Theatre,
 Juneau, Alaska
 Coliseum Theatre
 Ketchikan, Alaska.

Dear Sir:

This is to supplement my wire of even date. According to my records no payments have been received on the above accounts since your remittance covering the payments up to and including January 4. The accounts at present are in arrears as follows:

Coliseum, Juneau

Weekly billings January 11, 18, 25, and February 1	\$119.00
Merchandise items: November 23, \$28.50; December 1, \$7.40; December 31, \$4.50.....	40.40
Total.....	<u>\$159.40</u>

Coliseum, Ketchikan [304]

Weekly billings January 11, 18, 25, February 1	\$119.00
Merchandise items: November 25, \$18.67; December 1, \$13.85; December 31, \$15.90; January 2, \$4.20, \$2.50 and \$36.00.....	91.12
	<u>\$210.12</u>

(Testimony of W. D. Gross.)

Kindly arrange to make your future payments weekly and in advance in accordance with your contract, so that the account will at all times be up to date.

Very truly yours,

ELECTRICAL RESEARCH
PRODUCTS INC.

By R. H. PEARSALL

RHP/HH

Credit & Collection Dept.

Thereupon Defendant Gross further testified: My office or business will testify as to plaintiff's telegram dated March 5, 1930.

Whereupon said telegram was received in evidence marked

PLAINTIFF'S EXHIBIT No. 37-B

and reads:

3/5/30

W. D. Gross

Juneau, Alaska

Coliseum and Ketchikan accounts five weeks in arrears totaling hundred forty eight dollars seventy five cents each Stop Kindly forward check return mail Stop Wire confirmation

R. H. Pearsall

Electrical Research Products Inc.

26 words

Night Letter

RHP/HH

(Testimony of W. D. Gross.)

Thereupon defendant Gross further testified: My theatre received this telegram dated March 14, 1930.

Whereupon said telegram was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-C,

and reads:

3/14/30

W. D. Gross
Coliseum Theatre
Juneau, Alaska

Your accounts seven weeks in arrears totaling four hundred sixteen dollars fifty cents Stop Cannot permit continued use of equipment unless remittance in full received immediately Stop Wire confirmation

R. H. Pearsall

Electrical Research Products Inc.

Night Letter 30 words

RHP/HH

[305]

Thereupon defendant Gross further testified: My signature is affixed to my letter, dated April 23, 1930, to plaintiff.

Whereupon defendant's said letter to plaintiff, dated April 23, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-D

and reads:

(Testimony of W. D. Gross.)

THE ALASKA FILM EXCHANGE

W. D. Gross, Manager

Juneau, Alaska

April 23, 1930

Electrical Research Products Inc.

Los Angeles, Calif.

Att: Mr. Pearsall:

Dear Sir:

When I was in Seattle, I straighten up my account with Mr. Gage. To the amount of \$538.00.

At that time I requested a itemized statement of this account. To date I have failed to receive it.

I would appreciate it very much if you would be so kind as to forward me this statement.

Very truly yours,

WDG/c

(Signed) W. D. GROSS.

Thereupon defendant Gross further testified: My manager will state whether or not we received plaintiff's letter to Gross, dated May 5, 1930.

Thereupon plaintiff's said letter to defendant, dated May 5, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-E,

and reads:

(Testimony of W. D. Gross.)

May 5, 1930

Mr. W. D. Gross
 c/o Coliseum Theatre
 Juneau, Alaska

Re: Coliseum Theatres
 Juneau & Ketchikan, Alaska

Dear Sir:

This is to acknowledge receipt of your check in the amount of \$538. to pay the following items:

COLISEUM, JUNEAU		
W/E February 8, through March 29,		
@ 29.75		\$238.00
Merchandise,	March 20,	31.00
		<hr/>
		\$269.00
		[306]

Apparently, your request for this receipt was mislaid but I hope our failure to forward same has not caused you any inconvenience.

May I take this opportunity to call to your attention the present delinquencies on your account:

COLISEUM, JUNEAU		
W/E April 5, through May 3,		
@ 29.75		\$148.75
Merchandise	April 17,	7.13
	April 18,	1.89
	April 22,	1.45
	April 24,	1.80
		<hr/>
	Total	\$161.02
	Less Cr.	1.90 \$159.12

(Testimony of *W. D. Gross*.)

COLISEUM, KETCHIKAN

W/E April 5, through May 3,

@ 29.75		\$148.75	
Merchandise,	April 7,	12.08	
	April 17,	6.10	
	Total	<u>166.93</u>	
	Less Cr.	3.00	\$163.93

Thereupon Defendant *Gross* further testified: I didn't personally receive plaintiff's telegram to me dated May 21, 1930; my manager will answer questions regarding it.

Thereupon plaintiff's said telegram to defendant, dated May 21, 1930; was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-F,

and reads:

5/21/30

W. D. Gross

Coliseum Theatre

Juneau, Alaska

Your accounts seven weeks delinquent amounting four hundred sixteen dollars fifty cents plus merchandise nine dollars sixty five cents Juneau account fifteen dollars eighteen cents Ketchikan Stop Forward immediate check to cover wire confirmation

R. H. Pearsall

Electrical Research Products Inc.

34 Words—Night Letter

Chg: 70-1218

RHP/HK

(Testimony of W. D. Gross.)

Thereupon Defendant Gross further testified: Plaintiff's telegram to me dated May 28, 1930, was received by my office or my manager.

Whereupon plaintiff's said telegram to defendant, dated May 28, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-G,
and reads: [307]

5/28/30

W. D. Gross
Coliseum Theatre
Juneau, Alaska

Refer my wire May twenty first your accounts now nine weeks delinquent amounting five hundred thirty five dollars fifty cents plus merchandise twenty three dollars one cent Ketchikan eleven dollars sixty cents Juneau Stop Cannot permit continued use of equipment unless remittance in full received immediately wire confirmation

R. H. Pearsall

Electrical Research Products Inc.

48 Words Night Letter

Chg: 70-1218

RHP/HK

Thereupon Defendant Gross further testified: Plaintiff's telegram to me dated June 6, 1930, was received by my manager or office.

(Testimony of W. D. Gross.)

Thereupon plaintiff's said telegram to defendant dated June 6, 1930, was received in evidence marked

PLAINTIFF'S EXHIBIT No. 37-H,

and reads:

6/6/30

W. D. Gross
Coliseum Theatre
Juneau, Alaska

Your accounts delinquent five hundred seventy dollars twelve cents Stop Will be forced to refer legal department unless remittance in full received immediately Stop Wire confirmation

R. H. Pearsall

Electrical Research Products Inc.

26 Words—Night Letter

Chg: 70 1218

RHP/HK

Thereupon Defendant Gross further testified: My office or manager received plaintiff's telegram to me, dated June 14, 1930.

Whereupon plaintiff's said telegram to defendant, dated June 14, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-I,

and reads: [308]

6/14/30

W. D. Gross
Coliseum Theatre
Juneau, Alaska

Retel thirteenth Coliseum accounts delinquent six hundred fifty four dollars fifty cents weekly billing

(Testimony of W. D. Gross.)

plus merchandise eleven dollars sixty cents Juneau
twenty five dollars twenty two cents Ketchikan

R. H. Pearsall

Electrical Research Products Inc.

28 Words—Night Letter

Chg: 70-1218

RHP/HK

Thereupon Defendant Gross further testified: My office received plaintiff's telegram to me, dated July 11, 1930.

Thereupon plaintiff's said telegram to defendant, dated July 11, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-J,

and reads:

4/11/30

W. D. Gross
Coliseum Theatre
Juneau, Alaska

Your accounts fourteen weeks delinquent plus merchandise twenty two dollars eighty cents Juneau account thirty nine dollars forty cents Ketchikan strict adherence to your contract is expected on these accounts and unless immediate remittance in

(Testimony of W. D. Gross.)

full is received will be forced to refer your accounts to legal department wire confirmation

R. H. Pearsall

Electrical Research Products Inc.

50 Words—Night Letter

Chg: 70-1218

RHP/HK

Thereupon Defendant Gross further testified: My office received plaintiff's telegram to me, dated September 22, 1930.

Thereupon plaintiff's said telegram to Gross dated September 22, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 37-K

and reads: [309]

September 22, 1930

W. D. Gross

Juneau, Alaska

In reply your letter fifteenth cannot alter present contracts relative service charges Stop Total delinquency Coliseum Theatres Juneau and Ketchikan now fifteen hundred sixty-two dollars ninety-five cents Stop Unless payment received in full by October third will refer accounts legal department

R. H. Pearsall

Credit & Collection Dept.

Night Letter

RHP/Ar

43 70-1218

(Testimony of W. D. Gross.)

Thereupon Witness Gross further testified: I was in Juneau when I wrote my letter of February 17, 1930, to plaintiff, defendant's exhibit F-4; I didn't go to Seattle until after I had written that letter of March 28, 1930, defendant's exhibit F-5; my manager reported that box office receipts both in my Juneau and Ketchikan theatres were attached but I have no recollection of it and am not positive about it.

After plaintiff's talkie equipment was installed in the Juneau Coliseum Theatre about May 10, 1929, we charged an admission price of \$1.00 and kept up that price until the pictures dropped but I can't tell the time and have no idea of the number of months; in Ketchikan after we installed plaintiff's equipment there about June 1, 1929, the admission price was \$1.00 and it continued until the pictures dropped, but I don't know for how many months and my books won't show that, my books wouldn't show the price, just the receipts; the only day book that I have is the bank account book, which is true both of Ketchikan and Juneau during all of this period; I formerly ran silents three times a week in each theatre and sound once a week until silents were abolished one year after the equipments were installed, when the admission price in both theatres was dropped to 75¢, but I don't know how long that continued; we dropped the admission price in Juneau to 50¢ about January [310] 15, 1931, and also in Ketchikan at the same time, because pictures were

(Testimony of W. D. Gross.)

cheaper; that was the day the Capitol started in Juneau under new management; we had always had quite a little competition but it had not affected my business a bit; that is true, both of Juneau and Ketchikan; I don't know how long I continued at the 50¢ price and have no record that will show of either Juneau or Ketchikan; neither my manager nor other people would have a record of that fact; we destroy our records everywhere; sometimes keep them a year and a half and then destroy them; but we don't destroy them until after the income tax return is made up; don't think we have any records for 1933, 1932, or 1931; I don't know the dates when we dropped our admissions and have no way of stating it at this time; none of my employees has any record of that; I have copies of my income tax return for 1929, 1931, 1932, and 1933; my income tax returns show all the rent money and all the theatres I run under my control; everything I take in, at the seven theatres, is shown on that; I don't make a separate return for the Alaska Film Exchange, that is just a clearing house for myself; I am willing to produce my income tax reports, Witness Tuckett will deliver them;

I never increased my seating capacity in the Juneau Coliseum Theatre but took a lot of seats out gradually after the business dropped off when we put in the Universal High Power equipment; I acted as general manager for both my theatres, I didn't make any charge for salary, took the profit

(Testimony of W. D. Gross.)

as salary, just drew what I needed; after April 20, 1931, I took money from the Petersburg, Wrangell, Douglas, Haines, and Sitka Theatres and deposited it in the Alaska Film Exchange and then it would pay for the Juneau and Ketchikan Theatres; I drew the checks; sometimes I made the entry in the books, sometimes Tuckett did; if Tuckett was here he kept my books, if I was here and Tuckett wasn't, I kept the books, I kept a separate set for Ketchikan in Juneau; my Ketchikan manager didn't have any authority to draw checks; everything was signed by me.

My Juneau Theatre is situated in the Coliseum Building and I don't charge myself any rent for the theatre in that building; [311] I never charged any rent to the theatre for the use of any other part of that building; the Coliseum Building in Ketchikan has no apartments or living quarters in it; I had separate meters for the theatre and apartments in the Coliseum Building Juneau, but not for my office where the Alaska Film Exchange is located and I never charged it any rent; I ran all my theatres from that one office under the same management; Tuckett was my Juneau manager, I was general manager, and Louis Lemieux was Ketchikan local manager most of the time.

I had three operators in my Juneau Theatre on May 10, 1929, L. C. Lemieux, Ned Lemieux, and Billy Burke, and paid them each \$150.00 to \$175.00; that went into effect when we got sound; I paid

(Testimony of W. D. Gross.)

Tuckett \$250.00 a month until we started to lose business, after plaintiff took the machines out; I paid him \$250.00 right along from May 11, 1929, until April 20, 1931; I paid Louis Lemieux \$250.00 a month for the same period; after Ned Lemieux went to Haines I raised his wages to \$225.00 a month; Donald Sinclair and Zolman Gross took his place and I paid Zolman \$100.00 a month until the present time and Donald Sinclair \$150.00 a month up until May 1, 1933; I also had porters for the Juneau Coliseum Theatre, whom I paid \$175.00 a month all this time until they took out the machines, April 20, 1931. I didn't discharge him then. His pay went down from \$175.00 to \$125.00, then \$75.00, then \$50.00 a month when he quit.

Business went down as soon as we lost the talkie equipment on April 20, 1931; it hadn't started to go down before that but had gone up all the time; in Ketchikan I had Louis Lemieux, paying him \$250.00 a month from July, 1929, until I had to put in the Wonderphone or Masterphone equipment, about April 24, 1931; I paid Ralph Bontrager \$175.00 a month right along until April 24, 1931, and Ole Olsen \$100.00 a month right along until May 1, 1933; also I had a porter named Steve Sarakoff, he is in the books there, I don't know just how long I paid him \$185.00, a month.

Whereupon the following proceedings took place:
[312]

Q. Between May 11th, 1929 and April 20th, 1931 what did your advertisements cost in the Juneau Coliseum theatre?

(Testimony of W. D. Gross.)

Mr. HELLENTHAL: That is a matter which will also be covered by Mr. Tuckett. I don't think Mr. Gross knows anything about it.

The COURT: I imagine the books themselves will show. I don't know how any witness can carry all these details in his head. I don't believe we are getting anywhere at all, we will be going over the same ground as soon as the books are produced.

Mr. ROBERTSON: He has no books except the check register, which they assured us was the only books they had. We haven't yet got all those.

The COURT: The witness keeps talking about "the books will show." If he has any books which will show that, let's have the books.

Q. Mr. Gross, aren't those the only books you have, these bank check registers?

A. Yes.

Q. You have no other books of any kind whatever?

A. No, only just books with conditional bill of sale contracts, or any contract I mark down in a ledger, I owe him so much and credit him every time we pay him an amount.

Q. You have a ledger besides?

A. Yes, but only for the creditors. This is a cash book. We never done credit with anybody, only if I build an apartment house and they take credit, we mark down in the ledger as a

(Testimony of W. D. Gross.)

credit and we mark it down here; these books show everything we pay out.

Q. You have absolutely no other books besides these five check books?

A. That is how I carried on the business right along.

Q. You have some kind of a ledger?

A. Just a ledger for the creditors. We mark down we owe them so much money.

The COURT: Haven't you any books showing what employees you had at different times and how much you paid them?

A. Yes, this Your Honor.

The COURT: What you paid for advertising?

A. Yes.

The COURT: All contained in those books?

A. Yes, every month it will show that.

Mr. RODEN: That is not so, Your Honor.

Mr. ROBERTSON: We would like to have the ledger produced, Your Honor. [313]

Mr. HELLENTHAL: I don't know there is such a book, Mr. Robertson.

The WITNESS: If there is any books for 1931 or 1933 whatever we will produce them. Mr. Tuckett must have them in his possession.

Q. (Mr. HELLENTHAL): What is that ledger? Has it anything to do with the theatre business?

(Testimony of W. D. Gross.)

A. No. Just a credit business I got on conditional bills of sale contract.

Q. (Mr. HELLENTHAL): It has nothing to do with the theatre?

A. No.

Q. (Mr. HELLENTHAL): Any entries in it relating to the theatres?

A. No, nothing at all; just under "apartments" any credits that we get that is the only way I keep track of it.

Mr. RODEN: This is nothing but a check deposit, to show the check was issued and to whom it was issued and the amount. It doesn't say what it was for or anything else.

The COURT: It is not proper cross examination; there is no question about that.

Thereupon Defendant Gross further testified: The receipts of my Juneau Theatre did not take a considerable drop as early as February, 1930; the receipts for my theatre did not take a considerable drop when the Capitol Theatre started up in January, 1931; the receipts for my Ketchikan Theatre did not take a considerable drop as early as December, 1929; business in my Juneau and Ketchikan Theatres was not bad in the fall of 1930; it is not true that the reason why I didn't pay the service charges was because of the bad condition of my business in both those houses; I wrote this letter addressed to plaintiff dated March 1, 1930, and it bears my signature.

(Testimony of W. D. Gross.)

Thereupon defendant's letter to plaintiff dated November 1, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 38,

and reads:

THE ALASKA FILM EXCHANGE

Juneau, Alaska

Nov. 1, 1930

Electrical Research Product Inc.

Los Angeles, Calif.

Mr. Pearsall:

[314]

Dear Sir:

Enclosed you will please find check for the amount of \$500.00. Kindly credit same to my account.

Just as soon as business picks up a little and I am able I will again remit to you. As it is now business is very bad and we are hardly every out of the red. Anyway within the next 30 or 60 days I expect to have this account straightened up in full.

Thanking you for your co-operation in this matter in advance I remain,

Very truly yours,

WDG/x

(Signed) W. D. GROSS.

Whereupon Defendant Gross further testified: I wrote that letter of November 1, 1930, but business hadn't been bad all that fall. I signed my letter to plaintiff of September 15, 1930.

(Testimony of W. D. Gross.)

Whereupon Defendant's letter to plaintiff dated September 15, 1930, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 39

and reads:

THE ALASKA FILM EXCHANGE

Juneau, Alaska

Sept. 15, 1930

Electrical Research Products Inc.

7064 Hollywood Blvd.

Los Angeles, Calif.

Gentlemen:

I notice that the Service Charges have piled up again on our Western Electric equipment.

I will state that it is impossible to pay these Service Charges as we have numerous other expenses to meet and have to keep our theatres running but find it impossible to do so and still pay you Service Charges.

I feel that I have done more than anybody else has done towards the Electrical Research Products Inc. I paid out \$21,000 for the machines and also about \$3,000 for service which I never received value.

I therefore feel that my help can take care of the equipment and if we need any service will wire to Seattle and pay the expenses from Seattle to either Juneau or Ketchikan whatever the case may be. This is the best I can do at present.

(Testimony of W. D. Gross.)

I would like to receive a letter from you in regards to your opinion to the Service Charge, as if I have to pay Service Charges for 10 years I would rather install RCA and by using their equipment I wouldn't have to pay any Service Charge.

Please let me know what your intentions are as I will have to prepare for another mechanism.

Yours truly,

WDG/ZG

(Signed) W. D. GROSS. [315]

Redirect Examination

Thereupon Defendant Gross further testified: When I put sound equipment in my Ketchikan and Juneau Theatres in 1929, there was no other sound equipment in use in Alaska; I went to Seattle some time in September, 1929; I said in my Cross Examination that Captain Lathrop offered me \$150,000.00 for my Juneau and Ketchikan Theatres.

Thereupon the following proceedings took place:

Q. When was it Captain Lathrop made you that offer?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial. It was only brought out in his testimony as what he claimed he told me in my office.

The COURT: You may ask him.

Mr. ROBERTSON: Exception.

Thereupon Defendant Gross testified: Captain Lathrop made me that offer when I was running silent pictures. when business was good, several years before I talked with Attorney Robertson about

(Testimony of W. D. Gross.)

taking the equipment out of my theatres; I had three conversations with Witness Gage about the service matter; Witness Cawthorn was with me on the first occasion, some time in the first part of April, 1929, in a restaurant; Cawthorn was with me on the occasion when I signed those supplemental agreements, plaintiff's exhibits Nos. 2 and 4, in September, 1929; nobody was with me when I paid Gage \$538.00 in April, 1930; at that time Gage said that if I don't pay the money he has a bill for he will tear the equipment out, which was in addition to the chicken story; I wrote the letter, defendant's exhibit No. F-5, not in Juneau, but in Seattle; when I first put in talkie equipment, talkie films were around \$500.00 a picture and \$100.00 for a record—that was when I was charging \$1.00 admission; as the price of pictures dropped I put the price of admission down; during the time that I ran the silent pictures part of the week and sound part of the week, I charged 50¢ when I ran the silents and \$1.00 when I ran the talkies.

Whereupon the following proceedings took place:
[316]

Q. Now, Mr. Gross, referring to these reports of Mr. Shearer that have been offered in evidence—— What was the reason, if any, that the Coliseum Theatre in Juneau didn't commence to show profits after Shearer took hold of it.

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.

(Testimony of W. D. Gross.)

The COURT: He may answer.

Mr. ROBERTSON: Exception, Your Honor.

A. The Coliseum theatre—Shearer made it as a sluff-off house, put cheaper pictures in,—the Capitol—his own theatre—he wanted to bring it up to a high price theatre and charged 40 cents where the Coliseum theatre was only 25 cents.

Q. Cut the Coliseum theatre down to a twenty-five cent place?

A. Where the Capitol was forty cents, running outstanding pictures.

Q. What was the character of the pictures he ran in the Coliseum theatre?

A. Cheap pictures.

Thereupon Defendant Gross further testified: I ran in the Coliseum Theatre before I turned it over to Shearer the best pictures manufactured in the United States and the same way in Ketchikan, but after Shearer got hold of the theatres in Ketchikan, he charged 40¢ in the Coliseum and 40¢ in the Revilla and divided the pictures equally between the houses, good or bad.

Re-Cross Examination

Thereupon Witness Gross further testified: I said my five theatres in the other towns supported my Juneau and Ketchikan theatres towards the last; and the talkie equipment in those five theatres was the same kind of equipment I had in the Juneau

(Testimony of W. D. Gross.)

and Ketchikan theatres after plaintiff's equipment was taken out.

Re-Direct Examination

Thereupon defendant Gross further testified: There was no RCA or Western Electric equipment in competition with those theatres. [317]

H. E. CAWTHORNE

Thereupon H. E. Cawthorne, defendant's witness, being first duly sworn testified:

Direct Examination

I am and for over twenty years have been in the picture show business and have operated talking equipment here and in Seattle in my own theatre, and operated practically all kinds of sound equipment, RCA, Western Electric, and independent equipments; I operated Western Electric in Seattle and was running my own theatre; I know the meaning attached to the word "service", when used in connection with equipment by those engaged in the moving picture business.

Whereupon the following proceedings took place:

Q. Now, I will ask you what that meaning is, if any?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written contract by parole evidence.

(Testimony of H. E. Cawthorne.)

Mr. HELLENTHAL: Only a matter of interpretation.

The COURT: He may answer.

Mr. ROBERTSON: Exception.

A. "Service" as applied to the moving picture machines, as other machines, means to keep those machines in perfect running order, perfect condition.

Q. At all times?

A. At all times.

Mr. ROBERTSON: Object as very leading, if the court please.

Q. What is the meaning of terms "inspection" and "minor adjustment" when employed by those engaged in the sound equipment business?

Mr. ROBERTSON: Same objection.

The COURT: He may answer.

Mr. ROBERTSON: Exception.

A. "Inspection" could be made for any part of the theatre, that is, as far as the sound is concerned, the "minor adjustments" might mean just focussing an exciter lamp or something of that kind, not really repairing anything.

Q. Not repairing anything?

A. No.

Q. When you repair a machine what do you call that? [318]

A. Repair would be overhauling, keeping it up.

(Testimony of H. E. Cawthorne.)

Q. What do you call that?

Mr. ROBERTSON: Same objection, if the court please.

Q. Would you call that service or inspection?

A. I would call that "service."

Q. But merely adjusting it you call minor adjustment?

A. Minor adjustment.

Thereupon Witness Cawthorne further testified I had the regular Western Electric Company contract for service in Seattle and paid a weekly service charge, and to the best of my knowledge the contracts I operated under and the Gross contracts are identical; the service clause was in the contracts, that is if Gross had service; my service clause was filled in, stating how much I had to pay; it wasn't left blank like defendant's.

Whereupon the following proceedings took place:

Q. What did you get in the way of service, under your contract?

Mr. ROBERTSON: Same objection to that, if the court please.

The COURT: Overruled.

A. We got weekly service—a man called at the theatre. We were supposed to have weekly service. Sometimes it was ten days, but generally a weekly service, on a given day at a given hour, and the man came in and gave the machine a complete going over, that is, looking

(Testimony of H. E. Cawthorne.)

over the tubes, exciter lamps, lenses, batteries, switches.

Q. Is that what you in your business call "service" or inspection?

Mr. ROBERTSON: Same objection to that, if the court please.

Q. That weekly visit.

The COURT: Objection overruled.

A. I called that service. We could call him at any time and he would give us that service at any time we needed him.

Thereupon Witness Cawthorne further testified: We could get him any time of the day or night; we had his telephone number; they supplied us with the telephone number and we could always get a service man; it would not take very long to get there; those weekly visits were on service, but of course sometimes it was merely on inspection but if he found anything that needed service, he serviced it: [319] if there were no repairs made I would call the weekly visits inspections; if the machines needed service he gave them service; I have known Defendant fifteen years; in April, 1929, I was defendant's outside representative, living in Seattle and looking after his affairs and during that month he and I saw Witness Gage on Film Row and we went to the Rendevous Restaurant.

Whereupon the following proceedings took place:

Q. While you were with Mr. Gage on that occasion, either in the restaurant or before you

(Testimony of H. E. Cawthorne.)

went in, what, if anything, did Mr. Gage say to you with reference to the contract that Mr. Gross has since been operating under, that is the contracts of March 28th, 1929?

Mr. ROBERTSON: Assuming that is for the purpose of adducing evidence under the defense relative to duress and the counter-claim under duress I object as incompetent, irrelevant and immaterial, on the theory there is no valid duress pleaded in either.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

A. Mr. Gage called to Mr. Gross, we was on one side of the street and Mr. Gage on the other, met in the middle of the street. Gage informed Mr. Gross that he had got the contracts through with "Erpi" for Mr. Gross, without service charges, and congratulated Mr. Gross on his good fortune in getting equipment for Alaska, told him that the contracts had went through.

Thereupon Witness Cawthorne further testified: My employment with defendant continued up until December, 1929, and on December 30, 1929, I met him in Seattle and went with him to Gage's office.

Whereupon the following proceedings took place:

Q. What happened after you got into Mr. Gage's office? State what it was about and what transacted.

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.

(Testimony of H. E. Cawthorne.)

The COURT: Overruled.

Mr. ROBERTSON: Exception.

A. Well, as soon as we came into the office Mr. Gage was sitting there and he greeted Mr. Gross and I, and Mr. Gross wanted to know what all this rumpus about service charges was, said he had received a wire from his manager in Ketchikan stating the Western Electric was trying to collect some kind of service charge and wanted to know what it was all about. Mr. Gage stated the company was now in a position to render service up there and they was demanding him that he pay service charges. Mr. Gross argued he had no service charges and was trying to verify the fact by Mr. Gage. The argument was quite lengthy and quite heated, they got pretty warm on both sides for quite a while. Finally Mr. Gage said that he had no alternative that [320] the company wanted these services and he was only working for the company and he had to obey or do as they told him, so he said, "There is no out, you have got to pay these service charges and sign" an agreement of some kind.

Q. Did he bring out the agreements?

A. And with that he pushed a couple of sheets or a couple of documents across the table and told Dave that he had to sign those papers and pay the money right then or he would not

(Testimony of H. E. Cawthorne.)

accept any more money either on the contract or anything unless the services were paid and those papers signed. Mr. Gross and I we started

Q. Did he say anything further about the equipment?

A. Well, yes, he did. We started arguing among ourselves. He turned around and says, "There is no use in arguing, this thing. If you don't sign those papers, pay this money, Dave, they will come up there and tear your equipment out just like the telephone man tears the phone off the wall if the telephone isn't paid for.

Q. Did he say "he" or "they" would do it?

A. I wouldn't say whether "he" or "they"—that the Western Electric Company would do it.

Q. Then what happened?

A. Mr. Gross and I went into a conference, and he brought out the fact Mr. Gross didn't have all of his original—that is all of the payments on his original purchase or contract made, and that if he didn't or wouldn't accept any more money on it he was afraid they could and would take the machines away from him.

Mr. ROBERTSON: I move to strike as a conclusion, that "he was afraid they would take them out" as not proper testimony.

(Testimony of H. E. Cawthorne.)

The COURT: Motion sustained.

A. Mr. Gage was sitting right across the
able from him.

The COURT: Was he present?

A. Yes, he was.

The COURT: Very well.

A. So he decided then that, or we, Gross
and I, decided Mr. Gage did have the authority
and would take the machines away from him,
so with that he paid the money demanded,
some nine hundred and some odd dollars and
signed the documents.

Q. Both papers?

A. Both papers.

Q. What, if anything, further, did Mr. Gage
say at that time with relation to service?

A. He got friendly with Mr. Gross again
then and congratulated Mr. Gross on his good
judgment, and said that was the best thing
he ever done and he said, "Now you are going
to get real service at Ketchikan and Juneau,"
and he said that he would establish an office
in Juneau with a service man in both Ketchikan
and Juneau. [321]

Q. Mr. Cawthorne, after you and Mr. Gage
and Mr. Gross went into the restaurant on that
occasion did Mr. Gage say anything more about
service?

A. Yes sir.

Q. What was it, please?

(Testimony of H. E. Cawthorne.)

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

A. During the course of the conversation, Mr. Gage said to Mr. Gross, "Well, now, Dave, I hope you never have to send for that service man."

Cross Examination

Thereupon Witness Cawthorne further testified: I was in defendant's employ about nine years from 1926 up to and including the present time and now manage his Petersburg Theatre and have been doing so for about sixteen months; prior to that I ran and was manager of his Ketchikan Theatre about a year; I went there the latter part of June, 1932; prior to that I was working for him in Seattle doing outside work like buying and booking pictures and anything he wanted me to do outside in conjunction with my own work; the first conversation between Gage, defendant and myself was in April, 1929, on Film Row in Seattle; the next was in December, 1929, in Gage's office in Seattle; the equipments at that time were in Juneau and Ketchikan; I ran the Mission Theatre in Seattle for about five months starting January 1, 1932, and until some time in May, 1932; I operated theatres at various times in Seattle ever since 1908 at different places; I also operated the Grand Theatre in Seattle up until about the time we had this con-

(Testimony of H. E. Cawthorne.)

versation with Gage in 1929; I believe from January 1929 until September, 1929, part of the time managing it for defendant and afterwards I had a lease on it; I didn't have a contract relative to talkie equipment for the Grand Theatre with the Western Electric; the contract I had was for the Mission Theatre when I had the lease for five months in 1932; but I didn't personally hold the contract, I believe Mr. Lucan, the manager of a chain of suburban theatres held it; I leased the Mission Theatre from him and operated on my own hook; I saw the Lucan contract when I signed the lease in Lucan's office in the Beacon Theatre; I didn't take a copy of it; [322] I don't believe I ever saw the contracts, plaintiff's exhibits Nos. 1 and 3, after they were signed but I read those contracts after I came here; with the exception of a rider stuck in defendant's contracts there were a couple of little loose riders in there, to the best of my knowledge they were identical with the Lucan contract but I don't remember what were on the riders in the contracts; Lucan had a regular printed form of contract in 1932 with plaintiff but I don't know how long he had had it at that time or its date; I believe in the Lucan contract there were two mentions of the word "service" one for Minor adjustment and inspection and another clause that mentioned service, but they were both very vague, there was no real definition in regard to the word "service" or of the word "inspection" or of the words

(Testimony of H. E. Cawthorne.)

“minor adjustment”; the equipment in the Mission Theatre under the Lucan contract wasn’t actually serviced more than two or three times while I had it because the equipment didn’t need it at that time and I excused the service man and used to sign his blanks when he wanted to get in a date or something—I would sign his blanks so it wasn’t really service all the time he was there but on two or three times he came in and did do something; his name was Johnson; he was plaintiff’s man; as I remember, I believe he called on Wednesdays. [323]

CHARLES M. TUCKETT,

defendant’s witness, being first duly sworn, testified:

Direct Examination

I live in Portland, Oregon where I am employed as district representative of the Portland General Electric Company. I worked for defendant from August, 1925, to May, 1933, having been operator for approximately the first year and after that manager; when defendant was out of town he turned his books over to me and I kept them as I was the only one who could understand his system of keeping these books. I am familiar with them; they contain all the records of the business transactions of the Coliseum Theatre at Juneau from 1927 until the present date, and the Alaska Film Exchange the

(Testimony of Charles M. Tuckett.)

same, and of the Coliseum Theatre in Ketchikan from 1927 until 1933.

Whereupon the books referred to by witness were offered in evidence, to which plaintiff objected as follows: "We assume they are offered in evidence in connection with the First and Third Counter-claims and object to them as incompetent, irrelevant and immaterial", upon which objection the Court ruled: "They may be received at this time with the understanding that they are properly connected up", to which ruling plaintiff excepted, whereupon said books were received in evidence and marked as DEFENDANT'S EXHIBITS H-1, H-2, H-3, H-4,

H-5, H-6 and H-7,

which original exhibits are hereby incorporated herein because typewriting would not show the different colors in ink and lead pencil in which they are written or show corrections, interlineations and amendments therein, and made a part hereof.

Thereupon Witness Tuckett further testified: Defendant originally in his theatres has what he calls daily reports, in which the box office or cashier makes up a statement of the night's business; from that statement the manager of the theatre checks up the cash received and deposits it in the bank; we take the daily report and check it against the deposits that were made in the book; those daily reports were destroyed after we checked them up with the internal revenue and these are the only books now in existence; [324] they show all expenditures

(Testimony of Charles M. Tuckett.)

including salaries, repairs, replacements, and cost of film, in fact all of defendant's business applying to the Theatres, both receipts and expenditures. The receipts, being the deposits, are marked on the outside edge, I think under "bank balance"; no check book is kept besides these books, these are the check books, we just use blank checks which do not come out of the book and have no check stubs. These books contain the check stubs and register and that kind of thing. This paper marked defendant's Exhibit I for identification is the work sheet that witness Stabler and myself made up for the entire year 1929 of the Coliseum Theatre at Ketchikan, the top sheet being a summary of the work sheets, which show the expenses, the different people we paid, the different amounts, the total, the gross receipts for each month and is taken from each individual item on the books and is entirely accurate.

Whereupon said document was offered in evidence, to which plaintiff objected on the ground that it was incompetent, irrelevant and immaterial, which objection was over-ruled, to which ruling plaintiff excepted. Whereupon said work sheet was admitted in evidence, marked Defendant's Exhibit I, and reads as follows: [325]

(Testimony of Charles M. Tuckett.)

EXHIBIT No. I.

PROFIT AND LOSS STATEMENT
1929

COLISEUM THEATRE
KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	\$ 2,203.90	\$ 2,166.46	\$ 37.44	
February	2,222.15	1,876.30	345.85	
March	2,489.95	1,293.31	1,196.64	
April	2,697.50	1,539.29	1,158.21	
May	3,766.30	2,012.06	1,754.24	
June	5,931.00	2,270.17	3,660.83	
July	6,234.07	4,220.48	2,013.59	
August	7,519.70	3,236.05	4,283.65	
September	6,682.75	2,635.33	4,047.42	
October	7,209.70	2,698.26	4,511.44	
November	5,705.85	2,472.71	3,233.14	
December	4,314.20	2,497.11	1,817.09	
	<hr/>	<hr/>	<hr/>	<hr/>
	56,977.07	28,917.53	28,059.54	
	28,917.53			
	<hr/>			
Proof:	28,059.54			

Memorandum:

Net Profit for year 1929	\$28,059.54
Depreciation taken during year 1929.....	5,717.25
	<hr/>
Actual Net Profit for Year 1929.....	\$22,342.29
	<hr/> <hr/>

[326]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JANUARY, 1929.

Working sheet shows following items:

Wages: F. O. Meeker, \$100.00—Arthur Biggs, \$200.00—Cliff Daigler, \$175.00—Ralph Bontrazer \$135.00—Florence Bontrazer, \$15.00—Miss Hardcastle, \$35.00—M. McTague, \$25.00	
Film Rental: Warner Bros. 25%, \$145.87—Educational 25%, \$26.62—United Artists 25%, \$94.37—Pathe Films 25%, \$208.41.	
Film Freight: Aaa. S. S. Co. \$21.60	
General Expense: None.	
Replacements & Repairs: Vic Lougheed, \$311.05.	
Advertising: Aaa. Chronicle, \$91.05.	
Lights, Water, Tele.: City Lite & Power \$102.92.	
Heat: None.	
Insurance & Taxes: Davis & Johnson, \$312.50.	
Rental: Rental all. 6%, \$168.07.	
Gross Receipts:	\$2,203.90
Totals: Wages, \$685.00	
Film Rental, \$475.27	
Film Freight, \$21.60	
Replacements & Repairs, \$311.05	
Advertising, \$91.05	
Lights, Water, Tele., \$102.92	
Insurance & Taxes, \$312.50	
Rental, \$168.07—Total	2,166.46

 Net Profit.....\$ 37.44

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR FEB., 1929.

Working sheet shows following items:

Wages: Katherine Harcastle, \$35.00—G. Kirby, \$25.00—Arthur Biggs, \$200.00—Ralph Bontrager, \$170.00—Cliff Daigler, \$200.00.	
Film Rental: United Artists 25%, \$39.85—Educational Films, 25%, \$25.62—Famous Players, 25%, \$78.10—Pathe Films 25%, \$52.48—Famous Players 25%, \$116.04—Educational Films 25%, \$32.12—Columbia Films 25%, \$52.50—Pathe Film 25%, \$107.59.	
Film Freight: None.	
General Expense: Redmonds, \$12.50.	
Replacements, Repairs: Repairs, \$165.23.	
Adv.: Ketchikan Chronicle, \$102.30 — William Paul, \$40.00—Western Poster, \$6.54.	
Light, Water, Tele: <u>Citizens' Light & Power</u> , \$121.95.	
Heat: Standard Oil, \$112.16.	
Insurance, Taxes: None.	
Rental: Rental all 6%, \$168.07.	
Hauling: No Delay Transfer, \$13.25.	
Gross Receipts:	\$2222.15
Totals: Wages, \$630.00	
Film Rental, \$504.30	
Film Freight, None	
General Expense, \$12.50	
Replacement, Repairs, \$165.23	
Adv., \$148.84	
Light, Water, Tele., \$121.95	
Heat, \$112.16—Insurance, Taxes, None	
Rental, \$168.07—Hauling, \$13.25.	
Total	1876.30
Net Profit.....	\$ 345.85

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MARCH, 1929.

Working sheet shows following items:

Wages: R. Bentrager, \$170.00—Art Biggs, \$200.00
 C. Daigler, \$200.00—M. Rogers, \$50.00—A.
 Kirby, \$30.00.

Film Rental: Columbia Films 25%, \$12.44—Unit-
 ed Artists 25%, \$84.91—Warner Bros., 25%,
 \$76.45.

Film Freight: Aaa. S. S. Co., \$10.71.

General Expense: None.

Replacement, Repairs: J. R. Heckman, \$40.00.

Adv: Chronicle, \$90.50.

Light, Water, Tele: C. L. & P. Co., \$110.45.

Heat: Standard Oil, \$69.78.

Insurance, Taxes: None.

Rental: Rental all 6%, \$168.07.

Hauling: None.

Gross Receipts:\$2489.95

Totals: Wages, \$630.00

Film Rental, \$173.80

Film Freight, \$10.71

General Expense, None

Replacement, Repairs, \$40.00

Adv., \$90.50

Light, Water, Tele., \$110.45

Heat, \$69.78—Insurance, Taxes, None

Rental, \$168.07—Hauling, None.

Total 1293.31

Net Profit.....\$1196.64

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR APRIL, 1929.

Working sheet shows following items:

Wages: Ralph Bontrager, \$170.00—C. Daigler, \$200.00—Dorothy Manning, \$170.00—M. Rogers, \$30.00—G. Kirby, \$30.00.

Film Rental: Pathe Films 25%, \$76.28—Educational Films 25%, \$25.62—United Artists 25%, \$111.64—Famous Players 25%, \$125.78—Fox Films 25%, \$176.63—Educational 25%, \$25.62.

Film Freight: None.

General Expense: None.

Adv: Chronicle, \$81.25.

Light, Water, Tele: C. L. & P. Co., \$148.40.

Heat: None.

Insurance, Taxes: None.

Rental: Rental all 6%, \$168.07.

Hauling: None.

Gross Receipts:\$2697.50

Totals: Wages, \$600.00

Film Rental, \$541.57

Film Freight, None

General Expense, None

Replacement, Repairs, None

Adv., \$81.25

Light, Water, Tele., \$148.40

Heat, None—Insurance, Taxes, None

Rental, \$168.07—Hauling, None.

Total 1539.29

Net Profit.....\$1158.21

(Testimony of Charles M. Tuckett.)
Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MAY, 1929.

Working sheet shows following items:

Wages: M. Rogers, \$30.00—G. Kirby, \$30.00—
C. Daigler, \$400.00—Dorothy Manning, \$150.00
—R. Bontrager, \$170.00.

Film Rental: Fox Film 25%, \$269.58—Warner
Bros., 25%, \$309.03— Educational Films 25%,
\$32.12.

Film Freight: Expense, \$12.97—Aaa. S. S. Co.,
\$184.83.

General Expense: None.

Replacement, Repairs: G. R. Heckman, \$24.15.

Adv: Chronicle, \$63.35—Harrison Reports, \$12.50.

Light, Water, Tele: C. L. & P. Co., \$126.18.

Heat: \$29.28.

Taxes: None.

Rental: Rental all 6%, \$168.07.

Hauling: None.

Gross Receipts:\$3766.30

Totals: Wages, \$780.00

Film Rental, \$610.73

Film Freight \$197.80

General Expense, None

Replacement, Repairs, \$24.15

Adv., \$75.85

Light, Water, Tele., \$126.18

Heat, \$29.28—Taxes, None

Rental, \$168.07—Hauling, None

Total 2012.06

Total.....\$1754.24

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JUNE, 1929.

Working sheet shows following items:

Wages: M. Rogers, \$30.00—G. Kirby, \$30.00—D. Manning, \$150.00—R. Bontrager, \$150.00—Chas. Tuckett, \$225.00—Steve Sarakoff, \$92.00.

Film Rental: Fox Films 25%, \$196.43—United Artists 25%, \$133.32—Pathe Films 25%, \$56.62—Educational Films 25%, \$11.68—Educational Films, \$10.00—Warner Bros., 50%, \$293.96.

Film Freight: Express, \$12.97.

General Expense: General Expense, \$20.00—Keho, \$5.00.

Replacement, Repairs: Smith's Radio, \$10.79—Rheinharts, \$63.55—E. F. Okland, \$108.70—Davis Mfg., \$30.65—Tongass Trading Co., \$16.00—Elmer Johnson, \$39.60—Solly Mill, \$27.15—Davis Electric, \$51.47—K. Spruce Mill, \$24.76.

Adv: Chronicle, \$96.55—Harrison Reports, \$12.50—Studio, \$4.20.

Light, Water, Tele: C. L. & P. Co., \$105.15.

Heat: Standard Oil Co., \$48.80.

Insurance, Taxes: None.

Rental: Rental all 6%, \$168.07.

Hauling: No Delay Transfer, \$44.25.

Gross Receipts:\$5931.00

Totals: Wages, \$677.00

Film Rental, \$702.01

Film Freight, \$12.97

(Testimony of Charles M. Tuckett.)

General Expense, \$25.00	
Replacement, Repairs, \$371.67	
Adv. \$113.25	
Water, Light, Tele., \$105.15	
Heat, \$48.80—Rental, \$168.07	
Hauling, \$44.25—Total	2270.17
	<hr/>
Net Profit.....	\$3660.83
	[332]

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JULY, 1929.

Working sheet shows following items:

Wages: Steve Serakoff, \$120.00—D. Manning, \$155.00 — Ralph Bontrager, \$150.00 — Chas. Tuckett, \$225.00—G. Kirby, \$30.00—N. Gilbert, \$30.00.

Film Rental: United Artists 25%, \$37.50—Educational 25%, \$45.62—Pathe Film 25%, \$50.78—B. M. B. Bank 25%, \$352.67—Vitaphone Corpn. 50%, \$437.01—Vitaphone Corpn., 50%, \$362.50—Vitaphone Corpn., 50%, \$82.50—Vitaphone Corpn., 50%, \$68.59.

Film Freight: Aaa. S. S. Co., \$15.74.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$57.05.

Light, Water, Tele: C. L. & P. Co., \$106.45.

(Testimony of Charles M. Tuckett.)

Heat: Stand. Oil Co., \$19.52.

Insurance, Taxes: City of Ketchikan, \$742.05.

Rental: Rental all 6%, \$168.07.

Hauling: None.

Gross Receipts:\$7519.70

Totals: Wages, \$690.00

Film Rental, \$1437.17

Film Freight, \$15.74

General Expense, None

Repairs, Replacement, None

Adv., \$57.05

Light, Water, Tele., \$106.45

Heat, \$19.52

Insurance, Taxes, \$742.05

Rental, \$168.07—Hauling, None

Total 3236.05

Net Profit.....\$4283.65

[333]

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR AUG. 1929.

Working sheet shows following items:

Wages: Gertrude Kirby, \$35.00—D. Tuckett, \$35.00—D. Manning, \$150.00—S. Serakoff, \$120.00—R. Bontrager, \$130.00—C. Tuckett, \$225.00—D. Manning, \$80.00.

(Testimony of Charles M. Tuckett.)

Film Rental: Vitaphone Corpn., 50%, \$784.01—
 United Artists 25%, \$100.00—Fox Film, 25%,
 \$500.00—Fox Film 25%, \$277.00—Vitaphone
 50%, \$189.95—Warner Bros. 50%, \$457.90—
 Warner Bros. 50%, \$205.02—Fox Film 25%,
 \$399.75—Pathe 25%, \$32.68—Columbia 25%,
 \$7.02—Columbia 25%, \$11.29—Columbia 25%,
 \$27.50—Educational Films 25%, \$22.10.

Film Freight: Aaa. S. S. Co., \$66.09.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$83.95.

Light, Water, Tele: C. L. & P. Co. \$113.15.

Heat: None.

Insurance, Taxes: None.

Rental: Rental all 6%, \$168.07.

Hauling: None.

Gross Receipts:\$6234.07

Totals: Wages, \$775.00

Film Rental, \$3014.22

Film Freight, \$66.09

General Expense, None

Replacement, Repairs, None

Adv., \$83.95

Light, Water, Tele., \$113.15

Heat, None

Insurance, Taxes, None

Rental, \$168.07

Hauling, None—Total 4220.48

Net Profit.....\$2013.59

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR SETP. 1929.

Working sheet shows following items:

Wages: L. C. Lemmieux, \$225.00—G. Kirby, \$35.00—S. Serakoff, \$120.00—K. Hardeastle, \$35.00—R. Bontrager, \$150.00—Mrs. Oakes, \$35.00.

Film Rental: Vitaphone 50%, \$359.02—Warner Bros., 50%, \$332.00—United Artists 25%, \$137.50—B. M. B. Bank, 25%, \$200.58—Columbia Film 25%, \$6.72—Columbia Film 25%, \$27.50—Pathe Film 25%, \$12.50—Columbia Film 25%, \$12.92—Educational 25%, \$20.00—Tiffany Stahl 25%, \$26.05—Pathe Film 25%, \$68.10—Paramount 25%, \$53.78—Vitaphone Corpn., 50%, \$362.90.

Film Freight: Aaa. S. S. Co., \$11.96.

General Expense: Allied Amusements, \$25.00.

Replacement, Repairs: None.

Adv: Chronicle, \$78.25.

Light, Water, Tele: C. L. & P. Co., \$110.25.

Heat: Standard Oil Co., \$22.23.

Insurance, Taxes: None.

Rental; Rental all 6%, \$168.07.

Hauling: None.

Gross Receipts:\$6682.75

Totals: Wages, \$600.00

Film Rental, \$1619.57

Film Freight, \$11.96

General Expense, \$25.00

(Testimony of Charles M. Tuckett.)

Replacement, Repairs, None

Adv., \$78.25

Light, Water, Tele., \$110.25

Heat, \$22.23

Insurance, Taxes, None, Rental, \$168.07

Hauling, None—Total 2635.33

 Net Profit.....\$4047.42

[335]

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR OCT., 1929.

Working sheet shows following items:

Wages: L. Hulen, \$120.00—L. C. Lemmieux, \$225.00—S. Sarakoff, \$120.00—R. Bontrager, \$150.00—G. Kirby, \$35.00—C. Hardcastle, \$35.00.

Film Rental: Fox Film Co., 25%, \$446.25—United Artists 25%, \$150.00—Columbia Film 25%, \$40.30—Tiffany Stahl 25%, \$5.00—Educational 25%, \$30.00—Paramount Film 25%, \$244.68—Fox Film, 50%, \$231.67—Vitaphone 50%, \$349.30—Pathe Film 25%, \$92.28.

Film Freight: Aaa. S. S. Co., \$37.23.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$90.15.

Light, Water, Tele: C. L. & P. Co., \$113.70.

Heat: Standard Oil, \$14.63.

(Testimony of Charles M. Tuckett.)

Insurance, Taxes; None.

Rental: Rental 6% all, \$168.07.

Hauling: None.

Gross Receipts:\$7209.70

Totals: Wages, \$685.00

Film Rental, \$1589.48

Film Freight, \$37.23

General Expense, None

Replacement, Repairs, None

Adv., \$90.15

Light, Water, Tele., \$113.70

Heat, \$14.63—Insurance, Taxes, None

Rental, \$168.07—Hauling, None

Total 2698.26

Net Profit.....\$4511.44

[336]

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR NOV. 1929.

Working sheet shows following items:

Wages: L. Luken, \$120.00—L. Lemmieux, \$225.00

—S. Serakoff, \$120.00—R. Bontrager, \$150.00—

G. Kirby, \$35.00—C. Harcastle, \$35.00.

Film Rental: Warner Bros., 50%, \$132.50—Vita-

phone 50%, \$362.20—Warner 50%, \$305.87—

Fox Film 25%, \$221.39—Columbia 25%, \$47.50

—Paramount Films 25%, \$179.35—Pathe Ex-

change 25%, \$109.58.

Film Freight: Aaa. S. S. Co.,	\$20.26.
General Expense:	None.
Replacement, Repairs:	None.
Adv: Chronicle,	\$94.85.
Light, Water, Tele: C. L. & P. Co.,	\$135.50.
Heat: Standard Oil Co.,	\$10.64.
Insurance, Taxes:	None.
Rental: Rental all 6%,	\$168.07.
Hauling:	None
Gross Receipts:	\$5705.85
Totals: Wages,	\$685.00
Film Rental,	\$1358.39
Film Freight,	\$20.26
General Expense,	None
Replacement, Repairs,	None
Adv. \$94.85	
Light, Water, Tele.,	\$135.50
Heat, \$10.64—Insurance, Taxes,	None
Rental, \$168.07—Hauling,	None
Total	2472.71
	<hr/>
Net Profit.....	\$3233.14
	[337]

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR DEC. 1929.

Working sheet shows following items:

Wages: L. Luken, \$130.00—L. Lemmieux, \$250.00
 S. Sarakoff, \$145.00—R. Bontrager, \$175.00—
 G. Kirby—C. Hardcastle, \$45.00—E. Nowell,
 \$25.00.

(Testimony of Charles M. Tuckett.)

Film Rental: Educational Film 25%, \$42.17—
 Paramount Films 25%, \$546.20—Columbia 25%
 \$36.01—Pathe Exchange 25%, \$129.93—Fox
 Film 25%, \$183.30—Tiffany Stahl 25%, \$4.05
 —Vitaphone Corpn., 50%, \$248.75.

Film Freight: Aaa. S. S. Co., \$31.54.

General Expense: None.

Replacement, Repairs: Electrical Research, \$14.00.

Adv: Chronicle, \$103.15—Elks Club \$5.00—Legion,
 \$10.00.

Lights, Water, Tele: C. L. & P. Co., \$120.30.

Heat: Standard Oil, \$39.64.

Insurance, Taxes: None.

Rental: Rental all 6%, \$168.07.

Hauling: None.

Gross Receipts:\$4314.20

Totals: Wages, \$815.00

Film Rental, \$1190.41

Film Freight, \$31.54

General Expense, None

Replacement, Repairs, \$14.00

Adv., \$118.15

Light, Water, Tele., \$120.30

Heat, \$39.64—Insurance, Taxes, None

Rental, \$168.07—Hauling, None

Total 2497.11

Net Profit.....\$1817.09

(Testimony of Charles M. Tuckett.)

Thereupon said Tuckett further testified: Defendant's Exhibit I covers the Coliseum Theatre at Ketchikan from 1929, showing the monthly profits or losses in that Theatre.

Whereupon the following proceedings were had:

Q. I wish you would tell the jury what the total receipts, total expenses and total profits or loss is during each month during that year, commencing with the month of January.

Mr. ROBERTSON: Same objection, if the Court please, and further on the theory that profits are not recoverable in this action.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

Thereupon witness Tuckett testified: For defendant's Ketchikan Coliseum Theatre January, total receipts \$2,203.90, total expenses \$2,168.46, net profit \$37.44; February, total receipts \$2,222.15, total expenses, \$1,876.30, net profit \$345.85; March, total receipts, \$2,489.95, total expenses \$1,293.31, net profit \$1,196.64; April, total receipts \$2,697.50, total expenses \$1,539.29, net profit \$1,158.21; May, total receipts \$3,766.30, total expenses \$2,012.06, net profit, \$1,754.24; June, total receipts \$5,931.00, total expense \$2,270.17, net profit \$3,660.83; July, total receipts \$6,234.07, total expenses \$4,220.48, net profit \$2,013.59; August, total receipts \$7,519.70, total expenses \$3,236.05, net profit \$4,283.65; September, total receipts \$6,682.75, total expenses \$2,635.33, net profit \$4,047.42; October, total receipts \$7,209.70,

(Testimony of Charles M. Tuckett.)

total expenses \$2,698.26, net profit \$4,511.44; November, total receipts \$5,705.85, total expenses \$2,472.71, net profit \$3,233.14; December, total receipts \$4,314.20, total expenses \$2,497.11, net profit \$1,817.09; totals, receipts \$56,977.07, expenses, \$28,917.53, profits \$28,059.54, without depreciation. [339]

Thereupon Witness Tuckett further testified: "Depreciation taken during the year was \$5,517.25 or actual net profit for the year was \$22,342.29. Depreciation was taken from the government reports when they tabulated our accounts; Deputy Collector of Internal Revenue Clausen arrived at the figures through research work with the B. M. Behrends Bank and the actual cost of the property and we took the same depreciation in this statement that we took on defendant's income tax; the first subject of expenses is wages; we listed each employee and marked his monthly wages down; the monthly wages for the first month was \$685.00; the next item of expense is film rental of \$475.27 which was 25% of the film rental paid by the Alaska Film Exchange during the month as all the film run in either of defendant's Coliseum Theatres was paid by the Alaska Film Exchange, which was just another department of defendant's business used as a clearing house to pay for films; defendant would buy his films in Seattle from film exchanges there and had standing orders for so many pictures a month to be shipped usually on the last or first of the month and when the Companies made shipment

(Testimony of Charles M. Tuckett.)

to Alaska, to Ketchikan, at the time they would draw a check against the Alaska Film Exchange which defendant left with the film exchange in Seattle as he would leave signed checks with the different film exchanges that he had accounts with and when they made shipments they would draw checks to cover the amount of the shipment and attach an invoice to the shipment, which we check against the check when it was cashed here, so each Theatre would not have to pay for the film as it used it; and the Alaska Film Exchange would pay in one check a lump sum for film used in all of defendant's theatres, and Ketchikan which used the films first would pay 25% of the cost of the film, then next they would be sent to and used in Juneau, which would pay 50% of the cost, and then the other 25% of the cost of the films was paid by defendant's other theatres or other accounts. The reason why the Juneau Theatre paid more than the Ketchikan Theatre was that was about the best way we [340] could use it at the time and we figured that Juneau was a more stable town than Ketchikan; that segregation of film cost is carried through all these reports.

Whereupon the following proceedings were had:

Q. Was that a fair segregation?

Mr. ROBERTSON: Object as calling for a conclusion.

Mr. HELLENTHAL: Yes, but the witness is an expert on this subject.

(Testimony of Charles M. Tuckett.)

The COURT: He should know that of his own knowledge.

A. Yes, I think it was very fair, in fact Mr. Shearer did the same thing when he was running the business.

Mr. ROBERTSON: Object to what Mr. Shearer did.

The COURT: Objection sustained.

Whereupon Witness Tuckett further testified: The next item of expense is film freight, which each house paid, Ketchikan paying for it as it came from Seattle to Ketchikan, Juneau paying for it as it came to Juneau from Ketchikan, and the other houses paying to send the film outside again. In the Ketchikan Theatre there is a charge of freight of \$21.60, Seattle to Ketchikan. The next item is repairs, which some months is a little high, some not, the building in Ketchikan is on piles and defendant has a great deal of repair on the building in Ketchikan, also in Juneau. It is the actual repairs such as replacing parts damaged by storm, weather or people in the theatre, in fact to keep the theatre up, but not improvements. The next item is advertising, \$91.05 in Ketchikan only; the next item is heat and fuel of \$102.92 for the Ketchikan Theatre that month; the next item is taxes of \$312.50 for this certain period here; but we paid taxes throughout the year of different amounts as they were presented, that being the amount paid that

(Testimony of Charles M. Tuckett.)

month, and taxes being paid during other months which show in each month's statement; the next item is rent, \$168.07, which we figured at 8% of the capital investment as we had to arrive at a net profit and so had to take into consideration the amount of rent or interest on the capital investment. Defendant owns the buildings, both in Juneau and in Ketchikan.

The valuation of the capital investment in Ketchikan [341] in 1933 was arrived at from defendant's records, money expended, and Mr. Clausen's summary of the actual cost when he made the income tax returns, Clausen making the appraisal himself, and I think he had someone else make an appraisal. I am not sure, but anyway the internal revenue sanctioned his appraisal, which is the valuation placed on the buildings and equipment. I really don't know the exact figure of capital investment allocated to Ketchikan, but we have it in the work sheets here somewhere, but it is not a total, there has been depreciation, it was an exact calculation of the actual valuation of the property including everything in 1929, except the land which is not considered, although I would not be sure of that. The rent is calculated for each month by taking 1/12 of 6% of the capital investment for 1929 which we call rent; part of this property was acquired in 1922, and something like \$4000 or \$5000 depreciation already taken out; that was deducted from the original investment and the only thing

(Testimony of Charles M. Tuckett.)

we took into consideration was the balance; that applied to everything, in theory; it was the actual valuation of the capital investment in 1929; he made his appraisements at the time they were gotten and took the depreciation of the years that transpired until the present that he was checking, and figured the amount of depreciation that would allow for the year, also the capital investment of that year; we made an actual appraisement of the Ketchikan Coliseum Theatre property in 1929 and the figure we used represented the result of that appraisal, of which we took, 6% and used that as rent, being in fact, interest on capital investment; the profit and loss for each of the various months of 1929 were arrived at in the same manner on this statement. The document marked defendant's Exhibit I-1 for identification is work sheets and summary statements for the Coliseum Theatre in Ketchikan for the year 1930.

Whereupon said document was offered in evidence, to which plaintiff objected on the ground that it was incompetent, irrelevant [342] and immaterial, which objection was overruled, to which ruling plaintiff then excepted; whereupon said document was received in evidence, marked defendant's Exhibit I-1.

Thereupon Witness Tuckett further testified: Defendant's Exhibit I-1 shows the profit and loss of defendant's Coliseum Theatre in Ketchikan during 1930, and reads as follows: [343]

(Testimony of Charles M. Tuckett.)

EXHIBIT No. I-1.

PROFIT AND LOSS STATEMENT

1930

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	\$ 4,462.30	\$ 2,020.75	\$ 2,441.55	
February	3,942.70	2,821.06	1,121.64	
March	4,310.35	1,654.74	2,655.61	
April	4,727.70	1,014.68	3,713.02	
May	4,848.35	2,725.71	2,122.64	
June	4,504.05	1,661.01	2,843.04	
July	4,821.25	2,599.36	2,221.89	
August	4,365.35	1,683.75	2,681.60	
September	5,625.75	1,479.67	4,146.08	
October	4,613.00	2,613.38	1,999.62	
November	3,741.25	1,633.44	2,107.81	
December	2,813.15	1,972.98	840.17	
	<hr/>	<hr/>	<hr/>	<hr/>
	\$52,775.20	\$23,880.53	\$28,894.67	
	23,880.53			
	<hr/>			
Proof	\$28,894.67			

Memorandum:

Net Profit for year 1930.....	\$28,894.67
(Less) Depreciation taken during 1930.....	5,717.25
	<hr/>
Net Profit for Year 1930.....	\$23,177.42
	<hr/>

[344]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JANUARY, 1930.

Working sheet shows following items:

Wages: G. Kirby, \$35.00—C. Hardecastle, \$35.00—

L. Hulen, \$60.00—L. Lemmieux, \$225.00—R.

Bontrager, \$175.00—S. Serakoff, \$130.00.

Film Rental: Tiffany Stahl 25%, \$27.50—Pathe

Film 25%, \$150.25—Tiffany Stahl 25% \$19.05

Warner Bros. 50%, \$311.20 — Educational

Films 25%, \$15.00.

Film Frt: Aaa S. S. Co., \$15.95.

General Expense: None.

Replacement & Repairs: None.

Adv: Ketchikan Chronicle, \$86.65.

Lights, Water, Tele: C. L. & P. Co., \$87.55.

Heat: Standard Oil Co., \$70.62.

Ins. & Taxes: Davis & Johnson, \$125.00—Davis &
Johnson, \$312.50.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,462.30

Totals: Wages, \$660.00

Film Rental, \$523.00

Film Frt., \$15.95.

General Expense, None

Replacement & Repairs, None

Adv., \$86.65

Lights, Water, Tele., \$87.55

Heat, \$70.62—Ins. & Taxes, \$437.50

Rental, \$139.48—Total 2,020.75

Net Profit.....\$2,441.55

[345]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR FEBRUARY, 1930.

Working sheet shows following items:

Wages: G. Kirby, \$35.00—C. Hardeastle, \$35.00—
L. Lemmeiux, \$250.00—R. Bontrager, \$175.00
—S. Serakoff, \$130.00.

Film Rental: Paramount Films 25% \$351.08—
Fox Films 25%, \$151.87—Vitaphone 50%
\$510.10—Fox Films 50%, \$151.87—Education-
al Films 25%, \$30.74—Vitaphone Films 25%,
\$162.72—Famous Players 25%, \$159.24—War-
ner Bros. 25%, \$67.40—Pathe Exchange 25%,
\$74.72—Pathe Exchange 25%, \$91.98—Tiffany
Films 25%, \$21.47.

Film Frt: Aaa S. S. Co., \$20.62.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$76.15.

Lights, Water, Tele: C. L. & P. Co., \$102.50.

Heat: Standard Oil Co., \$84.12.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$3,942.70

Totals: Wages, \$625.00

Film Rental, \$1,773.19

Film Frt., \$20.62

General Expense, None

Replacement & Repairs, None

Adv., \$76.15

Lights, Water, Tele., \$102.50

Heat, \$84.12—Ins. & Taxes, None

Rental, \$139.48—Total 2,821.06

Net Profit.....\$1,121.64

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MARCH, 1930.

Working sheet shows following items:

Wages: M. Wentworth, \$35.00—J. Hardcastle, \$35.00—Steve Serakoff, \$130.00—R. Bontrager, \$175.00—L. C. Lemmieux, \$250.00.

Film Rental: Paramount Films 25%, \$325.71—Educational 25%, \$15.78—Warner Bros. 25%, \$41.25—Vitaphone 25%, \$187.21—Educational 25%, \$14.80—Pathe Films 25%, \$61.71.

Film Frt: Aaa S. S. Co., \$28.45.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$70.45.

Lights, Water, Tele: C. L. & P. Co., \$90.25.

Heat: Standard Oil, \$54.65.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,310.35

Totals: Wages, \$625.00

Film Rental, \$646.45

Film Frt., \$28.45

General Expense, None

Replacement & Repairs, None

Adv., \$70.45

Lights, Water, Tele., \$90.25

Heat, \$54.65—Ins. & Taxes, None

Rental, \$139.48—Total 1,654.74

Net Profit.....\$2,655.61

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR APRIL, 1930.

Working sheet shows following items:

Wages: M. Wentworth, \$35.00—K. Hardeastle,
\$35.00—L. C. Lemmieux, \$250.00—Ralph Bon-
trager, \$175.00—S. Sarakoff, \$130.00.

Film Rental: None.

Film Frt: Aaa S. S. Co., \$21.68.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$96.55.

Lights, Water, Tele: C. L. & P. Co., \$84.90.

Heat: Standard Oil, \$47.07.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,727.70

Totals: Wages, \$625.00

Film Rental, None—Film Frt., \$21.68

General Expense, None

Replacement & Repairs, None

Adv., \$96.55

Lights, Water & Tele., \$84.90

Heat, \$47.07—Ins. & Taxes, None

Rental, \$139.48—Total 1,014.68

 Net Profit.....\$3,713.02

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MAY, 1930.

Working sheet shows following items:

Wages: L. C. Lemmieux, \$250.00—R. Bontrager, \$175.00—S. Sarakoff, \$130.00—M. Wentworth, \$35.00—K. Harcastle, \$35.00.

Film Rental: 1st National Films 25%, \$154.07—
Vitaphone Films 25%, \$211.25—Warner Bros.
Films 25%, \$378.68—Fox Films 25%, \$291.01
Pathe Exchange, 25%, \$34.37—Tiffany Exch.
25%, \$33.97—Vitaphone 25%, \$433.79— Edu-
cational 25%, \$25.78.

Film Frt: Alaska S. S., \$19.87.

General Expense: None.

Replacement & Repairs: None.

Adv: Ketchikan Chronicle, \$166.25.

Lights, Water, Tele: C. L. & P. Co., \$176.90.

Heat: Standard Oil, \$35.29.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,848.35

Totals: Wages, \$625.00

Film Rental, \$1,562.92

Film Frt., \$19.87

General Expense, None

Replacement & Repairs, None

Adv., \$166.25

Lights, Water, Tele., \$176.90

Ins. & Taxes, None

Rental, \$139.48—Total 2,725.71

Net Profit.....\$2,122.64

[349]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JUNE, 1930.

Working sheet shows following items:

Wages: M. Wentworth, \$35.00—K. Hardecastle,
\$35.00—R. Bontrager, \$175.00—S. Sarakoff,
\$130.00—L. Lemmieux, \$250.00.

Film Rental: Vitaphone Films 25% \$289.50—War-
ner Bros. 25%, \$186.73—1st National Films
25%, \$85.25—Pathe Films 25%, \$95.11—Edu-
cational Films 25%, \$21.25.

Film Frt: Aaa S. S., \$10.13.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$104.55.

Lights, Water, Tele: C. L. & P. Co., \$90.25.

Heat: Standard Oil, \$13.76.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,504.05

Totals: Wages, \$625.00

Film Rental, \$677.84

Film Frt., \$10.13

General Expense, None

Replacement & Repairs, None

Adv., \$104.55—Heat, \$13.76

Ins. & Taxes, None

Rental, \$139.48—Total 1,661.01

Net Profit.....\$2,843.04

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JULY, 1930.

Working sheet shows following items:

Wages: R. Bontrager, \$175.00—S. Sarakoff, \$130.00

M. Wentworth, \$35.00—J. Hardecastle, \$35.00—

L. C. Lemmieux, \$250.00.

Film Rental: Tiffany Films 25%, \$36.39—Fox

Films 25%, \$227.25—Vitaphone Films 25%,

\$50.00—Paramount Films 25%, \$522.91—Pathe

Films 25%, \$76.02—Paramount Films 25%,

\$250.00—Educational Films 25%, \$22.94.

Film Frt: Aaa S. S. Co., \$11.99.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$92.20.

Lights, Water, Tele: C. L. & P. Co., \$87.80.

Heat: Standard Oil, \$40.88.

Ins. & Taxes: City of Ketchikan, \$382.50—City of

Ketchikan, \$34.00.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,821.25

Totals: Wages, \$625.00

Film Rental, \$1,185.51

Film Frt., \$11.99

General Expense, None

Replacement & Repairs, None

Adv., \$92.20

Lights, Water, Tele., \$87.80

Heat, \$40.88—Ins. & Taxes, \$416.50

Rental, \$139.48—Total 2,599.36

Net Profit.....\$2,221.89

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR AUGUST, 1930.

Working sheet shows following items:

Wages: S. Sarakoff, \$130.00—M. Wentworth, \$35.00—K. Harcastle, \$35.00—L. C. Lemmieux, \$250.00—R. Bontrager, \$175.00.

Film Rental: Educational Films 25%, \$53.00—Fox Films 25%, \$226.19—Pathe Films 25%, \$86.57—Vitaphone Films 25%, \$60.47—Warner Bros. Films 25%, \$92.87—Vitaphone Films 25%, \$133.00.

Film Frt: Aaa S. S. Co., \$19.36.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$121.80.

Lights, Water, Tele: C. L. & P. Co., \$89.85.

Heat: Standard Oil, \$36.16.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,365.35

Totals: Wages, \$625.00

Film Rental, \$652.10

Film Frt., \$19.36

General Expense, None

Replacement & Repairs, None

Adv., \$121.80

Lights, Water, Tele., \$89.85

Heat, \$36.16—Ins. & Taxes, None

Rental, \$139.48—Total 1,683.75

Net Profit.....\$2,681.60

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR SEPTEMBER, 1930

Working sheet shows following items:

Wages: M. Wentworth, \$35.00—L. C. Lemnieux,
\$250.00—S. Sarakoff, \$130.00—R. Bontrager,
\$175.00—Jane Grigsby, \$15.50.

Film Rental: Fox Films 25%, \$85.39—Paramount
Films 25%, \$253.89—Vitaphone Films 25%,
\$155.68.

Film Frt: Aaa S. S. Co., \$16.39.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$117.95.

Lights, Water, Tele: C. L. & P. Co., \$91.95.

Heat: Standard Oil, \$13.44.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$5,625.75

Totals: Wages, \$605.50

Film Rental, \$494.96

Film Frt., \$16.39

General Expense, None

Replacement & Repairs, None

Adv., \$117.95

Lights, Water, Tele., \$91.95

Heat, \$13.44—Ins. & Taxes, None

Rental, \$139.48—Total 1,479.67

Net Profit.....\$4,146.08

(Testimony of Charles M. Tuekett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR OCTOBER, 1930.

Working sheet shows following items:

Wages: M. Wentworth, \$35.00—L. C. Lemmieux, \$250.00—S. Sarakoff, \$130.00—R. Bontrager, \$175.00—J. Grigsby, \$35.00.

Film Rental: Paramount Films 25%, \$638.92—
Pathe Films 25%, \$178.02—Educational Films
25%, \$39.00—Fox Films 25%, \$54.29—Vita-
phone Films 25%, \$192.44—Paramount Films
25%, \$434.46—Educational Films 25%, \$29.87.

Film Frt: Aaa S. S. Co., \$25.79.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$118.05.

Lights, Water, Tele: C. L. & P. Co., \$95.50.

Heat: Standard Oil, \$42.56.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$4,613.00

Totals: Wages, \$625.00

Film Rental, \$1,567.00

Film Frt., \$25.79.

General Expense, None

Replacement & Repairs, None

Adv., \$118.05

Lights, Water, Tele., \$95.50

Heat, \$42.56—Ins. & Taxes, None

Rental, \$139.48—Total 2,613.38

Net Profit.....\$1,999.62

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR NOVEMBER, 1930.

Working sheet shows following items:

Wages: L. C. Lemmieux, \$250.00—M. Wentworth, \$35.00—J. Grigsby, \$35.00—R. Bontrager, \$170.00—S. Sarakoff, \$130.00.

Film Rental: Fox Films 25%, \$199.07—Pathe Films 25%, \$86.67—Paramount Films 25%, \$354.41.

Film Frt: Aaa S. S. Co., \$5.67.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$106.00.

Lights, Water, Tele: C. L. & P. Co., \$89.10.

Heat: Standard Oil, \$33.04.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$3,741.25

Totals: Wages, \$620.00

Film Rental, \$640.15

Film Frt., \$5.67

General Expense, None

Replacement & Repairs, None

Adv., \$106.00

Lights, Water, Tele., \$89.10

Heat, \$3304—Ins. & Taxes, None

Rental, \$139.48—Total 1,633.44

Net Profit.....\$2,107.81

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR DECEMBER, 1930.

Working sheet shows following items:

Wages: L. C. Lemmieux, \$250.00—M. Wentworth, \$35.00—J. Grigsby, \$35.00—R. Bontrager, \$170.00—S. Sarakoff, \$130.00.

Film Rental: Fox Films 25%, \$40.16—Vitaphone Films 25%, \$267.80—Pathe Films 25%, \$27.75—Paramount Films 25%, \$261.17—Fox Films, 25%, \$273.49—Pathe Films 25%, \$104.27.

Film Frt: Aaa S. S. Co., \$18.00.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$79.80.

Lights, Water, Tele: C. L. & P. Co., \$98.50.

Heat: Standard Oil, \$42.56.

Ins. & Taxes: None.

Rental: Rental all 6%, \$139.48.

Gross Receipts:\$2,813.15

Totals: Wages, \$620.00

Film Rental, \$974.64

Film Frt., \$18.00

General Expense, None

Replacement & Repairs, None

Adv., \$79.80

Lights, Water, Tele., \$98.50

Heat, \$42.56—Ins. & Taxes, None

Rental, \$139.48—Total 1,972.98

Net Profit.....\$ 840.17

(Testimony of Charles M. Tuckett.)

Witness Tuckett read the first page of Exhibit I-1 to the Jury and testified that he arrived at the depreciation of \$5,717.25 in the same way as in 1929, by taking off at various times the percentages, taking 10% off certain parts of the equipment, 5% off another part of the equipment; that he can explain it from his work sheets; that after depreciation was taken there was a profit of \$23,177.42; that the work sheets attached were made up in the same manner as those attached to 1929, showing the same items, income and expense calculated in the same manner. [356]

Thereupon Witness Tuckett further testified: The depreciation of \$5,717.25 was arrived at in the same way as in 1929 by taking off at various times, percentages, 10% off certain parts of the equipment, 5% off of another; the net profit after taking off depreciation in Ketchikan for that year was \$23,177.42; shows same items, income and expenses calculated in same way as 1929; defendant's exhibits I-2, I-3, and I-4 for identification are profit and loss statements, made by Witness Stabler and myself in the same manner as we made defendant's Exhibit I-1, for defendant's Coliseum Theatre in Ketchikan for the following respective periods, 1931, 1932, and January 1 to May 1, 1933, and were taken from the actual books themselves, defendant's exhibits H-1 to H-7, both inclusive.

Whereupon each of said documents were offered in evidence, to each of which plaintiff objected

(Testimony of Charles M. Tuckett.)

on the ground that it was incompetent, irrelevant and immaterial, which objections were overruled and to each of which rulings plaintiff then excepted, and said documents were then received in evidence marked Defendant's Exhibits I-2, I-3, and I-4, respectively, and read respectively, as follows: [357]

EXHIBIT No. I-2.

PROFIT AND LOSS STATEMENT

1931

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	\$ 3,290.35	\$ 2,457.70	\$ 832.65	
February	3,059.05	2,418.61	640.44	
March	3,422.00	1,760.18	1,661.82	
April	2,987.15	1,613.95	1,373.20	
May	2,741.60	1,794.34	947.26	
June	2,877.05	1,831.52	1,045.53	
July	2,957.80	2,305.85	651.95	
August	2,853.20	1,862.08	991.12	
September	2,966.30	1,955.70	1,010.60	
October	2,607.40	1,098.31	1,509.09	
November	2,312.00	2,300.16	11.84	
December	1,438.35	2,313.71		\$ 875.36
	<hr/>	<hr/>	<hr/>	<hr/>
	\$33,512.25	\$23,712.11	\$10,675.50	\$ 875.36
	23,712.11		875.36	
	<hr/>	<hr/>	<hr/>	<hr/>
Proof	\$ 9,800.14		\$ 9,800.14	

Memorandum:

Net Profit for Year 1931.....	\$ 9,800.14
(Less) Depreciation taken during 1931.....	5,717.25
	<hr/>
Net Profit for 1931	<u>\$ 4,082.89</u>

(Testimony of Charles M. Tuckett.)

Witness Tuckett read the foregoing part of Exhibit I-2 to the jury and testified that the profits and losses were calculated in exactly the same manner and by the same methods he calculated the profits and losses in 1930 and 1929, and all shown on the work sheets attached, covering the entire field, and taken from the books as the others were, each individual item taken from the actual books themselves. [358]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JANUARY, 1931.

Working sheet shows following items:

Wages: L. C. Lemmieux, \$250.00—R. Bontrager, \$87.50—R. Bontrager, \$87.50—M. Wentworth, \$35.00 — Jane Grigsby, \$3500 — S. Sarakoff, \$130.00.

Film Rental: Vitaphone 25%, \$61.24—Fox Films 25%, \$141.87—Tiffany Films 25%, \$9.60—Tiffany Films 25%, \$104.50—Paramount Films 25%, \$382.73—Warner Films 25%, \$250.00—Pathe Films 25%, \$62.69.

Film Frt: Aaa S. S. Co., \$23.56.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$102.75.

Lights, Water, Tele: C. L. & P. Co., \$108.75.

Heat: Union Oil, \$43.62.

Ins. & Taxes: City of Ketchikan, \$416.50.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$3,290.35

Totals: Wages. \$625.00

Film Rental. \$1,012.63

Film Frt. \$23.56

General Expense. None

Replacement & Repairs, None

Adv.. \$102.75

Lights, Water, Tele., \$108.75

Heat, \$43.62

Ins. & Taxes, \$416.50

Rental. \$125.89

Total 2,457.70

Net Profit.....\$ 832.65
[359]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan

EXPENSE ACCOUNT FOR FEBRUARY, 1931.

Working sheet shows following items:

Wages: F. Stanndard, \$175.00 — R. Bontrager, \$175.00—S. Sarakoff, \$130.00—M. Wentworth, \$35.00—J. Grigsby, \$35.00.

Film Rental: Fox Films 25%, \$213.33—Warner Films 25%, \$250.00—Pathe Films 25%, \$55.65 —Warner Films, 25%, \$250.00—Educational Films 25%, \$30.72—Paramount Films 25%, \$347.98—Warner Bros. 25%, \$284.70—Tiffany Films 25%, \$47.89 — Universal Films 25%, \$71.38.

Film Frt:Aaa S. S. Co., \$24.17.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$88.00.

Lights, Water, Tele: C. L. & P. Co., \$78.90.

Heat: None.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$3,059.05

Totals: Wages, \$550.00

Film Rental, \$1,551.65

Film Frt., \$24.17

General Expense, None

Replacement & Repairs, None

Adv., \$88.00

Lights, Water, Tele., \$78.90

Heat, None

Ins. & Taxes, None

Rental, \$125.89

Total..... 2,418.61

Net Profit.....\$ 640.44

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MARCH, 1931.

Working sheet shows following items:

Wages: F. Stanndard, \$175.00 — R. Bontrager,
 \$175.00 — S. Sarakoff, \$130.00 — J. Grigsby,
 \$30.00—M. Wentworth, \$30.00.

Film Rental: Fox Films 25%, \$213.10—Paramount
 25%, \$287.56—Warner Bros. 25%, \$256.66—
 Pathe Films 25%, \$118.05.

Film Frt: None.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$56.02.

Lights, Water, Tele: C. L. & P. Co., \$82.85.

Heat: Standard Oil, \$80.05.

Ins. & Taxes: None

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$3,422.00

Totals: Wages, \$540.00

Film Rental, \$875.37

Film Frt., None

General Expense, None

Replacement & Repairs, None

Adv., \$56.02

Lights, Water, Tele., \$82.85

Heat, \$80.05

Ins. & Taxes, None

Rental, \$125.89

Total..... 1,760.18

Net Profit.....\$1,661.82

[361]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR APRIL, 1931.

Working sheet shows following items:

Wages: S. Sarakoff, \$130.00—F. Stanndard, \$92.50
 —F. Stanndard, \$87.50—R. Bontrager, \$87.50—
 R. Bontrager, \$75.00—M. Wentworth, \$30.00—
 J. Grigsby, \$30.00.

Film Rental: Tiffany Productions 25%, \$35.38—
 Warner Bros. 25%, \$224.15—Pathe Films 25%,
 \$53.78—Paramount Films 25%, \$343.33—Edu-
 cational Films 25%, \$30.78.

Film Frt: Aaa S. S. Co., \$87.74.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$100.55.

Lights, Water, Tele: C. L. & P. Co., \$79.85.

Heat: None.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,987.15

Totals: Wages, \$532.50

Film Rental, \$687.42

Film Frt., \$87.74

General Expense, None

Replacement & Repairs, None

Adv., \$100.55

Lights, Water, Tele., \$79.85

Heat, None

Ins. & Taxes, None

Rental. \$125.89

Total..... 1,613.95

Net Profit.....\$1,373.20

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MAY, 1931.

Working sheet shows following items:

Wages: S. Sarakoff, \$130.00—J. Grigsby, \$30.00—
M. Wentworth, \$30.00 — F. L. Stanndard,
\$100.00—Chas. Tuckett, \$100.00—Roy Dolgner,
\$75.00.

Film Rental: Fox Films 25%, \$218.80—Fox Films
25%, \$268.56—Educational 25%, \$30.77—Tif-
fany Films 25%, \$47.67—Pathe Films 25%,
\$72.69—Warner Bros. 25%, \$330.42.

Film Frt: None.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$98.65.

Lights, Water, Tel: C. L. & P. Co., \$90.15.

Heat: Standard Oil, \$44.74.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,741.60

Totals: Wages, \$465.00

Film Rental, \$968.91

Film Frt., None

General Expense, None

Replacement & Repairs, None

Adv., \$98.65

Lights. Water & Tele., \$90.15

Heat, \$44.74

Ins. & Taxes, None

Rental. \$125.89

Total..... 1,794.34

Net Profit.....\$ 947.26

[363]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JUNE, 1931.

Workin sheet shows following items:

Wages: S. Sarakoff, \$130.00—C. Tuckett, \$200.00—
J. Grigsby, \$30.00—M. Wentworth, \$30.00.

Film Rental: Fox Films 25%, \$200.06—Educational
Films 25%, \$37.50 — Universal Films 25%,
\$73.15—Paramount Films 25%, \$338.98—War-
ner Bros. Films 25%, \$411.17 — Paramount
Films 25%, \$58.69—Pathe Films 25%, \$54.71.

Film Frt: Aaa S. S. Co., \$16.56.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle, \$125.65.

Lights, Water, Tele: None.

Heat: Stand. Oil, \$54.42—Stand. Oil, \$44.74.

Ins. & Taxes, None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,877.05

Totals: Wages: \$290.00

Film Rental, \$1,174.26

Film Frt., \$16.56

General Expense, None

Replacement & Repairs, None

Adv., \$125.65

Lights, Water, Tele., None

Heat, \$99.16

Ins. & Taxes, None

Rental, \$125.89

Total..... 1,831.52

Net Profit.....\$1,045.53

[364]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JULY, 1931.

Working sheet shows following items:

Wages: C. Tuckett, \$200.00—M. Wentworth, \$30.00
—H. McLean, \$40.00—S. Sarakoff, \$120.00.

Film Rental: Fox Films 25%, \$264.17—Paramount
25%, \$321.10—Tiffany Films 25%, \$45.37—Tif-
fany Films 25%, \$27.38—Educational Films
25%, \$36.31—Warner Bros. 25%, \$329.50—
Pathe Films 25%, \$121.47.

Film Frt: Aaa S. S. Co., \$25.68.

General Expense: None.

Replacement & Repairs: None.

Adv: Chronicle. \$123.94.

Lights, Water, Tele: C. L. & P. Co., \$88.60.

Heat: Stand. Oil Co., \$123.94.

Ins. & Taxes: City of Ketchikan, \$282.50.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,957.80

Totals: Wages, \$390.00

Film Rental, \$1,145.30

Film Frt., \$25.68

General Expense, None

Replacement & Repairs, None

Adv., \$123.94

Lights, Water, Tele., \$88.60

Heat, \$123.94.

Ins. & Taxes, \$282.50

Rental, \$125.89

Total.....\$2,305.85

Net Profit.....\$ 651.95

[365]

United States
Circuit Court of Appeals

For the Ninth Circuit.

ELECTRICAL RESEARCH PRODUCTS, INC.,
a corporation,

✓
Appellant,

vs.

W. D. GROSS,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 529 to 1043

Upon Appeal from the District Court of the United
States for the Territory of Alaska,
Division Number One

FILED

JAN - 8 1936

PAUL S. O'BRIEN,

United States
Circuit Court of Appeals

For the Ninth Circuit.

ELECTRICAL RESEARCH PRODUCTS, INC.,
a corporation,

Appellant,

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VOLUME II

Pages 529 to 1043

Upon Appeal from the District Court of the United
States for the Territory of Alaska,
Division Number One

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR AUGUST, 1931.

Working sheet shows following items:

Wages: M. Wentworth, \$30.00—C. Shearn, \$80.00—

H. McLean, \$40.00—C. Tuckett, \$200.00.

Film Rental: Fox Films 25%, \$159.99—Warner Bros. Films 25%, \$303.66—Paramount Films 25%, \$461.19—Tiffany Films 25%, \$45.70—Educational Films 25%, \$34.95—Pathe Films 25%, \$148.85.

Film Frt: Aaa S. S. Co., \$22.45.

General Expense: None.

Replacement & Repairs: None

Adv: Chronicle, \$119.20.

Lights, Water, Tele: C. L. & P. Co., \$87.20.

Heat: None.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,853.20

Totals: Wages, \$350.00

Film Rental, \$1,154.34

Film Frt., \$25.45

General Expense, None

Replacement & Repairs, None

Adv., \$119.20

Lights, Water, Tele., \$87.20

Heat, None

Ins. & Taxes, None

Rental, \$125.89

Total.....\$1,862.08

Net Profit.....\$ 991.12

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR SEPTEMBER, 1931.

Working sheet shows following items:

Wages: H. McLean, \$40.00—M. Wentworth, \$30.00
—C. Tuckett, \$200.00—C. Shearn, \$100.00.Film Rental: Universal Films 25%, \$64.25—Fox
Films 25%, \$251.39—Warner Bros. Films 25%,
\$310.43—Paramount Films 25%, \$322.49—Edu-
cational Films 25%, \$37.98 — Tiffany Films
25%, \$44.80.

Film Frt: Aaa S. S. Co., \$23.80.

General Expense: None.

Replacement & Repairs: Bowles Co., \$43.25—Na-
tional Theatre Supply, \$59.22.

Adv: Chronicle. \$107.80.

Lights, Water, Tel: C. L. & P. Co., \$73.40.

Heat: None.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,966.30

Totals: Wages, \$370.00

Film Rental, \$1,031.34

Film Frt., \$23.80

General Expense, None

Replacement & Repairs, \$224.47

Adv., \$107.80

Lights, Water, Tele., \$73.40

Heat, None

Ins. & Taxes, None

Rental, \$125.89

Total.....\$1,955.70

Net Profit.....\$1,010.60

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR OCTOBER, 1931.

Working sheet shows following items:

Wages: J. Grigsby, \$30.00—H. McLean, \$40.00—C. Tuckett, \$200.00—C. Shearn, \$100.00.

Film Rental: Fox Films 25%, \$193.62.

Film Frt: Aaa S. S. Co., \$19.25.

General Expense: None.

Replacement & Repairs: Nat. Theatre Supply, \$2.35
—O. Johanson, \$100.00—Al Nordstrom, \$95.00.

Adv: Chronicle, \$112.85.

Lights, Water, Tele: C. L. & P. Co., \$79.35.

Heat: None.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,607.40

Totals: Wages, \$370.00

Film Rental, \$193.62

Film Frt., \$19.25

General Expense, None

Replacement & Repairs, \$197.35

Adv., \$112.85

Lights, Water, Tele., \$79.35

Heat, None

Ins. & Taxes, None

Rental, \$125.89

Total.....\$1,098.31

Net Profit.....\$1,509.09

[368]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR NOVEMBER, 1931.

Working sheet shows following items:

Wages: Chas. Tuckett, \$200.00 — K. Harcastle, \$30.00—H. McLean, \$40.00—C. Shearn, \$100.00.
 Film Rental: Pathe Films 25%, \$85.20—Warner Bros. 25%, \$281.20—Pathe Films 25%, \$89.75—Tiffany Films 25%, \$79.82—Paramount Films 25%, \$283.82—Paramount Films 25%, \$92.56.
 Film Frt: Aaa S. S. Co., \$10.75—Ketch. Wharf, \$16.02.

General Expense: None.

Replacement & Repairs: Lewis Blandine, \$26.50—J. B. Hunchberger, \$210.60 — M. H. Smith, \$332.50—O. C. Crieder, \$87.75.

Adv: Chronicle, \$127.90.

Lights, Water, Tele: C. L. & P. Co., \$80.90.

Heat: None.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$2,312.00

Totals: Wages: \$370.00

Film Rental, \$911.35

Film Frt., \$26.77

General Expense, None

Replacement & Repairs, \$657.35

Adv., \$127.90

Lights, Water, Tele., \$80.90

Heat, None

Ins. & Taxes, None

Rental, \$125.89

Total.....\$2,300.16

Net Profit.....\$ 11.84

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR DECEMBER, 1931.

Working sheet shows following items:

Wages: H. McLean, \$40.00—K. Hardcastle, \$30.00
—C. Tuckett, \$200.00—C. Shearn, \$100.00.

Film Rental: Educational Films 25%, \$74.30 —
Warner Bros. Films, 25%, \$279.73 — Pathe
Films 25%, \$153.81—Paramount Films 25%,
\$277.60—Fox Films 25%, \$487.12.

Film Frt: Aaa S. S. Co., \$3.67.

General Expense: None.

Replacement & Repairs: Nat. Theatre Supply,
\$61.91.

Adv: Chronicle, \$130.00.

Lights, Water, Tele: C. L. & P. Co., \$83.95.

Heat: Stand. Oil, \$265.73.

Ins. & Taxes: None.

Rental: Rental all 6%, \$125.89.

Gross Receipts:\$1,438.35

Totals: Wages, \$370.00

Film Rental, \$1,272.56

Film Frt., \$3.67

General Expense, None

Replacement & Repairs, \$61.91

Adv., \$130.00

Lights, Water, Tele., \$83.95

Heat, \$265.73

Ins. & Taxes, None

Rental, \$125.89

Total.....\$2,313.71

Net Loss.....\$ 875.36

[370]

(Testimony of Charles M. Tuckett.)

EXHIBIT No. I-3.

PROFIT AND LOSS STATEMENT

1932

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	\$ 977.84	\$ 1,601.69		\$ 623.85
February	1,428.90	1,544.44		115.54
March	1,414.75	1,691.84		277.09
April	1,491.10	1,104.87	\$ 386.23	
May	1,193.90	1,343.59		149.69
June	733.35	622.90	110.45	
July	1,047.63	1,044.33	3.30	
August	1,192.67	1,176.62	16.05	
September	1,387.20	1,633.80		246.60
October	1,784.13	1,226.86	557.27	
November	1,244.10	1,721.31		477.21
December	1,034.95	671.07	363.88	
	<hr/>	<hr/>	<hr/>	<hr/>
	\$14,930.52	\$15,383.32	\$ 1,437.18	\$ 1,889.98
		14,930.52		1,437.18
		<hr/>		<hr/>
Proof		\$ 452.80		\$ 452.80

Memorandum:

Net Loss for Year 1932\$ 452.80
 Depreciation taken for 1932 4,152.20

\$ 4,605.00 (Loss)

(Testimony of Charles M. Tuckett.)

Witness Tuckett read the foregoing part of Exhibit I-3 to the jury and testified that it showed the profits and losses of the Ketchikan theatre during 1932, that it represented a net loss for the year, without depreciation; that he had spoken of net profit and loss before and meant thereby the total of individual months [371] and not for the year; that the loss after depreciation was \$4,605.00; that these records for 1932 were kept just as the preceding ones. [372]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JAN. 1932.

Working sheet shows following items:

Wages: H. McLean, \$40.00—K. Harcastle, \$30.00
—C. Tuckett, \$175.00.

Film Rental: Paramount Films 25%, \$83.62—R.
K. O. Films, 25%, \$59.27—Paramount Films
25%, \$279.03—Fox Films 25%, \$208.84—War-
ner Bros. Films 25%, \$253.45.

Film Freight: Aaa. S. S. Co., \$5.06.

General Expense: None.

Replacement, Repairs: Ketchikan Spruce, \$29.18—
C. W. Young Hdwe., \$126.96.

Adv: Chronicle, \$111.75.

Light, Water, Tele: C. L. & P. Co., \$94.40.

Heat: None.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$ 977.84

Totals: Wages, \$245.00

Film Rental, \$884.21

Film Freight, \$5.06

General Expense, None

Replacement, Repairs, \$156.14

Adv., \$111.75

Light, Water, Tele., \$94.40

Heat, None

Insurance, Taxes, None

Rental, \$105.13

Hauling, None.

Total..... 1601.69

Net Loss.....\$ 623.85

[373]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR FEB. 1932.

Working sheet shows following items:

Wages: H. McLean, \$40.00—K. Harcastle, \$30.00
—Chas. Tuckett, \$150.00—B. F. Moe, \$100.00
(C) Sheam, \$25.00—Bon Marche, \$70.60.

Film Rental: Cosmopolitan Film 25%, \$50.00—Edu-
cational Film 25%, \$40.11—Paramount Film
25%, \$253.28—Fox Film 25%, \$205.07—War-
ner Bros. Film 25%, \$284.16.

Film Freight: None.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$80.00.

Light, Water, Tele: C. L. & P. Co., \$74.20.

Heat: None.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: Ketchikan Express, \$37.00.

Gross Receipts:\$1428.90

Totals: Wages, \$415.60

Film Rental, \$832.51

Film Freight, None

General Expense, None

Replacement, Repairs, None

Adv., \$80.00

Light, Water, Tele., \$74.20

Heat, None

Insurance, Taxes, None

Rental, \$105.13

Hauling, \$37.00

Total..... 1544.44

Net Loss.....\$ 115.54

[374]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MARCH, 1932.

Working sheet shows following items:

Wages: C. Tuckett, \$150.00—C. Shearn, \$50.00—
Jane Woodruff, \$30.00—H. McLean, \$40.00.Film Rental: Fox Film 25%, \$249.79—Paramount
25%, \$256.33—Warner Bros. 25%, \$317.97—
Educational Film 25%, \$75.10—Pathe Film
25%, \$88.12—Pathe Film 25%, \$13.12.

Film Freight: Aaa. S. S. Co., \$24.38.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$94.50.

Light, Water, Tele: C. L. & P. Co., \$95.40.

Heat: Standard Oil, \$102.00.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1414.75

Totals: Wages, \$270.00

Film Rental, \$1000.43

Film Freight, \$24.38

General Expense, None.

Replacement, Repairs, None

Adv., \$94.50

Light, Water, Tele., \$95.40

Heat, \$102.00—Insurance, Taxes, None

Rental, \$105.13—Hauling, None

Total 1691.84

Net Loss.....\$ 277.09

[375]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR APRIL, 1932.

Working sheet shows following items:

Wages: C. Tuckett, \$150.00—C. Shearn, \$50.00—

H. McLean, \$40.00—J. Woodward, \$30.00.

Film Rental: Paramount Pictures 25%, \$258.56—

Fox Films 25%, \$158.05.

Film Freight: Aaa S. S. Co., \$12.28.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$125.25.

Light, Water, Tele: C. L. & P. Co., \$79.60.

Heat: Standard Oil, \$96.00.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1491.10

Totals: Wages, \$270.00

Film Rental, \$416.61

Film Freight, \$12.28

General Expense, None

Replacement, Repairs, None

Adv., \$125.25

Light, Water, Tele., \$79.60

Heat, \$96.00—Insurance, Taxes, None

Rental, \$105.13—Hauling, None.

Total 1104.87

Net Profit.....\$ 386.23

[376]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MAY, 1932.

Working sheet shows following items:

Wages: C. Shearn, \$50.00—M. Wentworth, \$30.00
—H. McLean, \$40.00—C. Tuckett, \$150.00.Film Rental: Miner Merchant Bank 25%, \$126.55
Miner Merchant Bank 25%, \$129.75—Warner
Bros. Film 25%, \$128.26—Paramount Film
25%, \$275.83.

Film Freight: Aaa. S. S. Co., \$10.72.

General Expense: None.

Replacement, Repairs: None.

Adv: Ketchikan Chronicle, \$122.40.

Light, Water, Tele: C. L. & P. Co., \$73.25.

Heat: Standard Oil, \$101.70.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1193.90

Totals: Wages, \$270.00

Film Rental, \$660.39

Film Freight, \$10.72

General Expense, None

Replacement, Repairs, None

Adv., \$122.40

Light, Water, Tele., \$73.25

Heat, \$101.70—Insurance, Taxes, None

Rental, \$105.13—Hauling, None.

Total 1343.50

Net Loss.....\$ 149.69

[377]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JUNE, 1932.

Working sheet shows following items:

Wages: C. Shearn, \$25.00—M. Wentworth, \$30.00
—Chas. Tuckett, \$150.00—Homer McLean,
\$40.00.

Film Rental: Aaa. S. S. Co., (film) 25%, \$52.50.

Film Freight: Aaa. S. S. Co., \$17.22.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$121.20.

Light, Water, Tele: C. L. & P. Co., \$81.85.

Heat: None.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$ 733.35

Totals: Wages, \$245.00

Film Rental, \$52.50

Film Freight, \$17.22

General Expense, None

Replacement, Repairs, None

Adv., \$121.20

Light, Water, Tele., \$81.85

Heat, None—Insurance, Taxes, None

Rental, \$105.13—Hauling, None.

Total 622.90

Net Profit.....\$ 110.45

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JULY, 1932.

Working sheet shows following items:

Wages: C. Shearn, \$50.00—M. Wentworth, \$30.00
—C. Tuckett, \$75.00—H. McLean, \$40.00—L.
Cawthorne, \$75.00.

Film Rental: Fox Film 25%, \$209.54—Fox Film
25%, \$193.62—Fox Film 25%, \$5.16.

Film Freight: Aaa. S. S. Co., \$76.53.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$74.00.

Light, Water, Tele: C. L. & P. Co., \$65.35.

Heat: Standard Oil, \$45.00.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1047.63

Totals: Wages, \$270.00

Film Rental, \$408.32

Film Freight, \$76.53

General Expense, None

Replacement, Repairs, None

Adv: \$74.00

Light, Water, Tele., \$65.35

Heat, \$45.00—Insurance, Taxes, None.

Rental, \$105.13—Hauling, None.

Total 1044.33

Net Profit.....\$ 3.30

[379]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR AUG. 1932.

Working sheet shows following items:

Wages: M. Wentworth, \$25.00—H. McLean, \$40.00
—H. E. Cawthorne, \$150.00—C. Shearn, \$50.00.

Film Rental: Paramount Films 25%, \$204.47—
R. K. O. 25%, \$27.58—Fox Film 25%, \$100.21
R. K. O. Film 25%, \$27.22—Educational
Film 25%, \$87.91—Fox Film 25%, \$20.82—Fox
Film 25%, \$158.22.

Film Freight: Aaa. S. S. Co., \$11.70.

General Expense: Miscell. Expense, \$3.36.

Replacement, Repairs: None.

Adv: Chronicle, \$72.40.

Light, Water, Tele: C. L. & P. Co., \$65.60.

Heat: Standard Oil, \$27.00.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1192.67

Totals: Wages, \$265.00

Film Rental, \$626.43

Film Freight, \$11.70

General Expense, \$3.36

Replacement, Repairs, None.

Adv., \$72.40

Light, Water, Tele., \$65.50

Heat, \$27.00—Insurance, Taxes, None

Rental, \$105.13—Hauling None.

Total 1176.62

Net Profit.....\$ 16.05

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR SEPT. 1932.

Working sheet shows following items:

Wages: E. Hanson, \$22.00—L. Cawthorne, \$150.00

M. Wentworth, \$25.00—H. McLean, \$40.00.

Film Rental: Fox Film 25%, \$179.95—Vitagraph

Film 25%, \$236.00—Educational Film 25%,

\$76.82—Vitagraph Film 25%, \$191.86—Para-

mount Film 25%, \$167.84—Universal Film

25%, \$26.71—Fox Film 25%, \$174.32—Fox

Film 25%, \$20.71.

Film Freight: A. S. S. Co., \$19.20.

General Expense: None.

Replacement, Repairs: None.

Adv: Queen Anne Candy, \$42.00 — Chronicle,
\$73.90.

Light, Water, Tele: C. L. & P. Co., \$73.36.

Heat: Standard Oil, \$9.00.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1387.20

Totals: Wages, \$237.00

Film Rental, \$1074.21

Film Freight, \$19.20

General Expense, None

Replacement, Repairs, None

Adv., \$115.90

Light, Water, Tele., \$73.36

Heat, \$9.00—Insurance, Taxes, None

Rental, \$105.13—Hauling None.

Total 1633.80

Net Loss.....\$ 246.60

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT, OCT. 1932.

Work sheet shows following items:

Wages: E. Hanson, \$50.00—Al. Cawthorne, \$150.00
—C. Harcastle, \$25.00—H. McLean, \$40.00.

Film Rental: Education Film 25%, \$81.94—Fox
Film 25%, \$162.42—Paramount Film 25%,
\$200.41—Vitagraph Film 25%, \$194.02.

Film Freight: Aaa. S. S. Co., \$15.17.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle, \$67.70—Station KGBU, \$25.00.

Light, Water, Tele: C. L. & P. Co., \$79.07.

Heat: Standard Oil, \$31.00.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1784.13

Totals: Wages, \$265.00

Film Rental, \$638.79

Film Freight, \$15.17

General Expense, None

Replacement, Repairs, None

Adv., \$92.70

Light, Water, Tele., \$79.07

Heat, \$31.00—Insurance, Taxes, None

Rental, \$105.13—Hauling, None.

Total 1226.86

Net Profit.....\$ 557.27

[382]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR NOV. 1932.

Working sheet shows following items:

Wages: E. Hanson, \$50.00—C. Harcastle, \$25.00—
H. McLean, \$40.00—L. Cawthorne, \$150.00.Film Rental: Warner Bros. 25%, \$192.86—Fox
Films 25%, \$177.29—Paramount Films 25%,
\$276.52—Warner Bros., 25%, \$241.00— Fox
Film 25%, \$128.65.

Film Freight: Aaa. S.S. Co., \$13.00.

General Expense: None.

Replacement, Repairs: None.

Adv.: K. G. B. U., \$25.00—Chronicle, \$62.04—Queen
Anne Candy, \$15.00

Light, Water, Tele: C. L. & P. Co., \$85.27.

Heat: Standard Oil, \$48.00.

Insurance, Taxes: Charles & Harcastle, \$86.55.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1244.10

Totals: Wages, \$265.00.

Film Rental, \$1016.32

Film Freight, \$13.00

General Expense, None

Replacement, Repairs, None

Adv., \$102 04

Light, Water, Tele., \$85.27

Heat, \$45.00

Insurance, Taxes, \$86.55

Rental, \$105.13

Hauling, None

Total..... 1721.31

Net Loss.....\$477.21

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR DEC. 1932.

Working sheet shows following items:

Wages: L. Cawthorne, \$150.00—H. McLean, \$40.00
—E. Hanson, \$50.00—Margaret Reed, \$25.00.

Film Rental: R. K. O. Films 25%, \$60.57.

Film Freight: Aaa. S.S. Co., \$1.10.

General Expense: None.

Replacement, Repairs: M. H. Smith & Son, \$16.55.

Adv: Chronicle. \$61.15—KGBU, \$25.00.

Light, Water, Tele: C. L. & P. Co., \$79.57.

Heat: Standard Oil, \$57.00.

Insurance, Taxes: None.

Rental: Rental all 6%, \$105.13.

Hauling: None.

Gross Receipts:\$1034.95

Totals: Wages, \$265.00.

Film Rental, \$60.57.

Film Freight, \$1.10.

General Expense, None.

Replacement, Repairs, \$16.55.

Adv., \$86.15.

Light, Water, Tele., \$79.57.

Heat, \$57.00.

Insurance, Taxes, None.

Rental, \$105.13.

Hauling, None.

Total 671.07

Net Profit.....\$ 363.88

(Testimony of Charles M. Tuckett.)

EXHIBIT No. I-4.

PROFIT AND LOSS STATEMENT

1933

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	\$ 1,004.68	\$ 966.45	\$ 38.23	
February	988.30	1,003.44		\$ 15.14
March	695.05	794.30		99.25
April	634.79	896.71		261.92
	<hr/>	<hr/>	<hr/>	<hr/>
	\$ 3,322.82	\$ 3,660.90	\$ 38.23	\$ 376.31
		3,322.82		38.23
		<hr/>		<hr/>
Proof		\$ 338.08		\$ 338.08

Memorandum:

Net Loss for Year 1933.....	\$ 338.08
(Plus) Depreciation taken for (4) four months.....	1,042.18
	<hr/>
	\$ 1,380.26
	(Loss)

House leased to B. F. Shearer on May 1st, 1933.

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR JAN. 1933.

Working sheet shows following items:

Wages: Al Cawthorne, \$150.00—H. McLean, \$40.00
—M. Reed. \$25.00—Earl Hanson, \$50.00.

Film Rental: R.K.O. Film 25%, \$31.87—Sheffield
Film 25%, \$25.00—Paramount Film 25%,
282.29.

Film Freight: Aaa. S.S. Co., \$16.41.

General Expense: None.

Replacement, Repairs: National Theatre Supply,
\$28.30.

Adv: KGBU, \$25.00—Chronicle, \$48.30.

Lights, Water, Tele: C. L. & P. Co., \$77.45.

Heat: Standard Oil, \$77.40.

Insurance, Taxes: None.

Rental: Rental all 6%, \$89.43.

Hauling: None.

Gross Receipts:\$1004.68

Totals: Wages, \$265.00

Film Rental, \$339.16

Film Freight, \$16.41

General Expense, None

Repairs, \$28.30

Adv., \$73.30

Lights, Water, Tele, \$77.45

Heat, \$77.40

Insurance, Taxes, None

Rental, \$89.43

Hauling, None.

Total..... 966.45

Net Profit.....\$ 38.23

[385]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR FEB. 1933.

Working sheet shows following items:

Wages: H. McLean, \$40.00—M. Reed, \$25.00—

E. Hanson, \$50.00—H. Cawthorne, \$150.00.

Film Rental: Educational Film 25%, \$20.00—R.K.O.

Film 25%, \$51.23—Fix Film 25%, \$143.42—

Warner Film 25%, \$205.76.

Film Freight: Aaa. S.S. Co., \$4.23.

General Expense: None.

Replacement, Repairs: None.

Adv: KGBU, \$25.00—Chronicle, \$48.10—U. S.

Slides, \$2.50.

Lights, Water, Tele: C.I.P. Co., \$79.67.

Heat: Standard Oil, \$69.00.

Insurance Taxes: None.

Rental: Rental all 6%, \$89.43.

Hauling: None.

Gross Receipts:\$ 988.30

Totals: Wages, \$265.00

Film Rental, \$400.41

Film Freight, \$4.23

General Expense, None

Repairs, None

Adv., \$75.60

Light, Water, Tele., \$79.67

Heat, \$69.00

Insurance, Taxes, None

Rental, \$89.43

Hauling, None

Total..... 1003.44

Net Loss.....\$ 15.14

[386]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR MARCH, 1933.

Working sheet shows following items:

Wages: E. Hanson, \$50.00—H. E. Cawthorne,
\$150.00—H. McLean, \$40.00—M. Reed, \$25.00.

Film Rental: Educational Films 25%, \$21.44—
Paramount, \$272.70.

Film Freight: None.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle Paper, \$56.05.

Lights, Water, Tele: C. L. P. Co., \$89.68.

Heat: None.

Insurance, Taxes: None.

Rental: Rental all 6%, \$89.43.

Hauling: None.

Gross Receipts:\$ 695.05

Totals: Wages, \$265.00

Film Rental, \$294.14

Film Freight, None

General Expense, None

Repairs, None

Adv., \$56.05

Lights, Water, Tele, \$89.68

Heat, None

Insurance, Taxes, None

Rental, \$89.43

Total..... 794.30

Net Loss.....\$ 99.25

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Ketchikan.

EXPENSE ACCOUNT FOR APRIL, 1933.

Working sheet shows following items:

Wages: M. Reed, \$15.00—L. Cawthorne, \$125.00—
Roy Dolner, \$50.00.Film Rental: Fox Film 25%, \$93.42—R. K. O. Film
25%, \$49.62—Warner Bros. Film 25%, \$21.34
—Sheffield Film 25%, \$25.00.

Film Freight: None.

General Expense: None.

Replacement, Repairs: None.

Adv: Chronicle Paper, \$56.35—Chronicle Paper,
\$48.67.Lights, Water, Tele: C. L. & P. Co., \$73.36—C. L.
& P. Co., \$79.27.Heat: Standard Oil, \$72.00—Standard Oil, \$57.00—
Standard Oil, \$41.25.

Insurance, Taxes: None.

Rental: Rental all 6%, \$89.43.

Hauling: None.

Gross Receipts:\$ 634.79

Totals: Wages: \$190.00

Film Rental, \$189.38

Film Frt., None

General Expense, None

Repairs, None

Adv., \$105.02

Lights, Water, Tele., \$152.63

Heat. \$170.25

Insurance, Taxes, None

Rental, \$89.43

Hauling, None

Total..... 896.71

Net Loss.....\$ 261.92

(Testimony of Charles M. Tuckett.)

Witness Tuckett testified that Exhibit I-4 was a profit and loss statement for the Ketchikan Coliseum theatre covering the first four months of 1933, from January to May 1, covering the entire period while defendant was operating it up to the time he turned it over to Shearer that was made up in the same way as Exhibits I-1, I-2, and I-3, shows exactly the same things in the same way, the receipts or the total receipts of the Ketchikan Coliseum theatre by month, and the total expenses by month are shown, calculated in the same manner as the others were calculated, and the profits and losses are shown and that the depreciation of \$1380.26 was taken in the same manner as the others. [388]

Thereupon Witness Tuckett further testified: That covers the entire period up to the time that defendant leased his theatres to Shearer commencing April, 1931, when the equipment was taken out; during that period there were quite drastic reductions in salaries, as they had been cut, and were cut again from \$250.00 which we originally got in 1929 and 1930, to \$150.00; our operator from \$170.00 to \$40.00 in 1933, the janitor from \$175.00 or \$170.00 was cut to \$50.00 and other minor or running expenses were cut as much as they could be; that started in April, 1931, right after the equipment was taken out and reached their low in May, 1933; this document that I now have is the work sheet of capital investment and depreciation of the Ketchikan Coliseum Theatre.

(Testimony of Charles M. Tuckett.)

Whereupon said document was offered in evidence by defendant, to which plaintiff objected upon the ground that it was incompetent, irrelevant and immaterial, which objection was overruled, to which ruling plaintiff then excepted, whereupon said document was submitted in evidence and marked defendant's exhibit I-5, and reads: [389]

DEPRECIATION RESERVE

	1932		1933	
	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.
Coliseum				
Acquired		\$11,351.17		\$9,624.63
Deprec. to	1,726.54		\$ 1,726.54	
Kimball C				
Acquired		None	—	—
Deprec. to	1,117.78			
F. & F.				
Acquired		None	—	—
Deprec. to	788.00			
Machine				
Acquired		—	—	—
Deprec. to	—			
Sound E				
Acquired		7,975.00		5,775.00
Deprec. to			1,100.00	
Sound E	1,100.00			
Acquired	200.00	2,800.00	300.00	2,500.00
Deprec.				
	152.20		3,126.54	
		21,026.17		17,899.63
		1,261.57		1,073.98
		105.13		89.43

(Testimony of Charles M. Tuckett.)

Whereupon said document was offered in evidence by defendant, to which plaintiff objected upon the ground that it was incompetent, irrelevant and immaterial, which objection was overruled, to which ruling plaintiff then excepted, whereupon said document was submitted in evidence and marked defendant's exhibit I-5, and reads: [389]

DEFENDANT'S EXHIBIT I-5.

COLISEUM THEATRE—KETCHIKAN—SCHEDULE OF CAPITAL INVESTMENT & DEPRECIATION RESERVE

	1929		1930		1931		1932		1933		
	Initial Cost	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.
Coliseum Theatre Bldg. 5%											
Acquired in 1923	\$34,530.79		\$16,530.79		\$14,804.25		\$13,077.71		\$11,351.17		\$9,624.63
Deprec. taken to & incl. 1929		\$18,000.00		\$17,265.54		\$ 1,726.54		\$ 1,726.54		\$ 1,726.54	
Kimball Organ 10%											
Acquired 1923	11,178.07		3,353.40		2,235.59		1,117.78		None	—	—
Deprec. taken to & incl. 1929		7,824.67		1,117.81		1,117.81		1,117.78			
F. & F. 10%											
Acquired in 1923	12,729.01		2,553.68		1,280.78		788.00		None	—	—
Deprec. taken to & incl. 1929		10,175.33		1,272.90		1,272.90		788.00			
Machine 10%											
Acquired in 1922	5,000.00		1,000.00		500.00		None		—	—	—
Deprec. taken to & incl. 1929		4,000.00		500.00		500.00		—			
Sound Equipment 10%											
Acquired in 1929	11,000.00		10,175.00		9,075.00		7,975.00		7,975.00		5,775.00
Deprec. taken to & incl. 1929		825.00		1,100.00		1,100.00				1,100.00	
Sound Equipment 10%											
Acquired in May 1, 1931	—	—	—	—	—	—	3,000.00	200.00	2,800.00	300.00	2,500.00
Deprec. (Orig. Cost \$3,000.00)											
		40,825.00		5,717.25		5,717.25		4,152.20		3,126.54	
	74,437.87		33,612.87		27,895.62		25,178.37		21,026.17		17,899.63
	4,466.27		2,016.77		1,673.74		1,510.70		1,261.57		1,073.98
			168.07		139.48		125.89		105.13		89.43

(Testimony of Charles M. Tuckett.)

Whereupon Witness Tuckett further testified: The capital Investment in 1929 of defendant's Ketchikan theatre was \$75,437.87 which was an actual appraisal made by Mr. Clausen and myself that year used as a basis for defendant's income tax purposes after the new equipment had been installed, which was included in the appraisal, and which was the real investment in 1929 for the theatre, including machinery, sound equipment and all furnishings, upon which we figured 6% as rent and took off 6% depreciation each year; all items of expenses shown on defendant's exhibits I-1, I-2, I-3 and I-4 are just as they occur on defendant's books, but there might be one or two exceptions; I do not say every one of the checks drawn in the Ketchikan books, defendant's exhibits H-6 and H-7 belonged to the Ketchikan theatre, but the majority of them did; I could not say all items belong to Ketchikan; I did not take in items that belonged to other theatres; all the items are correctly summarized, and the entire transaction is just as it shows on our books; all items charged or credited to Ketchikan were taken from the books and belonged to the Ketchikan theatre; this document that I now have in my hand gives the monthly average profit and loss in the Coliseum Theatre in Ketchikan.

Whereupon said document was offered in evidence, to which the plaintiff objected on the ground that it was incompetent, irrelevant and immaterial, which objection was overruled, to which ruling the plaintiff then excepted; whereupon said document

(Testimony of Charles M. Tuckett.)
was received in evidence, marked

DEFENDANT'S EXHIBIT I-6,

and reads:

AVERAGE MONTHLY PROFIT AND LOSS
STATEMENT

COLISEUM THEATRE

Ketchikan, Alaska

Monthly average profit or loss without depreciation	1929	\$2338.29 1/2 profit per mth.
Monthly average profit or loss with depreciation	1929	\$1861.95 3/4 profit per mth.
		[390]
Monthly average profit or loss without depreciation	1930	\$2407.89 profit per mth.
Monthly average profit or loss with depreciation	1930	\$1931.45 profit per mth.
Monthly average profit or loss without depreciation	1931	\$816.67 5/6 profit per mth.
Monthly average profit or loss with depreciation	1931	\$340.24 1/2 profit per mth.
Monthly average profit or loss without depreciation	1932	\$37.72 1/3 loss per mth.
Monthly average profit or loss with depreciation	1932	\$383.75 loss per mth.
Monthly average profit or loss without depreciation (4 mths)	1933	\$28.17 1/3 loss per mth.
Monthly average profit or loss with depreciation (4 mths)	1933	\$115.02 1/6 loss per mth.
Monthly average profit or loss June 1, 1929 to May 1, 1931 (W E installed) (\$56,969.94—23 mths) (profit) no depreciation		\$2476.96 profit per mth.
Monthly average profit or loss same conditions and time but with depreciation (\$10,958.06)		\$2000.52 profit per mth.

(Testimony of Charles M. Tuckett.)

(W E not installed)

Monthly average profit or loss	May 1, 1931 to May 1, 1933	\$187.55
(\$4501.15 profit—23 mths)		profit per mth.
No depreciation		
Monthly average profit or loss		
same conditions and time but with depreciation (\$9005.82)		\$187.70 loss per mth.

Thereupon Witness Tuckett further testified: Defendant's exhibit I-6 shows the average monthly losses calculated per year starting from the time defendant put in sound equipment until the property was turned over to Shearer, showing average monthly profit for 1929, without depreciation, of \$2,338.29 and, with depreciation taken off, \$1,861.85, and an average monthly profit for 1930, without depreciation, \$2,407.89, and, after depreciation taken off, \$1,931.45, and an average monthly profit for 1931, without depreciation, \$816.67 and, after depreciation, \$340.24, and for 1932, without depreciation, \$37.73 loss per month and, after [391] depreciation, \$383.75, and for the four first months of 1933 when we had the theater, without depreciation, \$28.17 loss per month, and, with depreciation, \$115.02 loss per month, which takes up to the time the theatre was turned over to Shearer; that sheet also shows the average profit and loss per month during the time the Western Electric Company equipment was in the Ketchikan theatre commenc-

(Testimony of Charles M. Tuckett.)

ing from date of installation in May or June, 1929, up to the time the equipment was taken out in about April, 1931, and a monthly average profit from June 1, 1929, to May 1, 1931, when the Western Electric Equipment was installed, which is 23 months, without depreciation, \$2,476.96 and, after taking depreciation, \$2,000.52; that sheet shows the average monthly profit and loss between the time that the equipment was replevined and the time the theatre was turned over to Shearer showing monthly average profit, May 1, 1931, to May 1, 1933, without depreciation, \$187.55, and, after depreciation, \$187.70; I can calculate the difference between the average monthly profit while the machinery was in and the average monthly profit and loss after the machinery had been taken out between those two periods, which shows an average monthly loss in profits, without depreciation, per month during that period of \$2,289.41, and, after depreciation, \$2,188.-22; the loss and profits for the entire 23 month period from the time the machine was taken out until Shearer's contract was entered into, was \$52,656.43, and, after depreciation, \$50,326.06; the fact that some of the items in the Ketchikan books, exhibits H-6 and H-7, do not belong to the Ketchikan theatre, did not affect the tabulation because I took only the Ketchikan items; this document that I now have is a copy of Shearer's financial statement to Gross of the Ketchikan theatre covering the period up to January 1, 1935, and shows the profit or loss Shearer made.

(Testimony of Charles M. Tuckett.)

Witness Tuckett further testified that Defendant's [392] Exhibit J covered the statements that had been offered in evidence up to January 1, 1935; that he didn't know how long the old equipment was kept in Alaska, wouldn't be positive about it, that it shows that he wasn't in Alaska at that time; that it shows the first two months along with the others. [393]

Whereupon said document was offered in evidence, to which plaintiff objected on the ground that it was incompetent, irrelevant, and immaterial and not the true measure of damages, which objection was overruled, to which plaintiff then excepted, whereupon said document was received in evidence and marked

DEFENDANT'S EXHIBIT J,

and reads:

ALASKA EMPIRE THEATRES, INC.

Operating Statement

May 31, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Receipts 85.60

Less Expenses:

Film Rent 10.00

Advertising 9.39

Rent 200.00

Heat, Light and Water 15.34

Proj. Rm. and House Sup. 1.55

Repairs 1.50

Sal. Oper. & Manager 51.50

289.28

Loss—Coliseum Theatre, Ketchikan.....\$ 203.68

Theatre operating part-time, with old-type sound equipment.

(Testimony of Charles M. Tuckett.)

June 30, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Organ Rental \$ 2.50

Less Expenses:

Rent \$ 200.00

Light 32.02

Proj. Room & House Supples 11.70

Repairs to Sound 86.08

Freight 11.25

Insurance, Pub. Liability 5.24

Total Expense \$ 346.29

Loss—Coliseum Theatre, Ketchikan.....\$ 343.79

July 31, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Receipts \$1,142.78

Less Expenses:

[394]

Film Rental 387.26

Advt. Bill Poster 66.33

Advt. Newspaper 84.28

Advt. Misc. 10.15

Rent 200.00

Heat, Light and Water 64.86

Proj. Room & House Sup. .40

Operators Salary 10.00

Manager Salary 50.00

Insurance 4.41

Sound Rental 22.60

Misc. Salaries 63.80

Misc. Expense .75

Total Expenses 964.84

Profit—Coliseum Theatre, Ketchikan.....\$ 177.94

(Testimony of Charles M. Tuckett.)

August, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Box Office Receipts	988.23
Rental on Building	85.00

 \$1,073.23

Less Expenses:

Film Rental	384.87
Advt. Bill Posters	37.67
Advt. Newspapers	69.30
Advt. Miscellaneous	24.60
Heat, Light and Power	40.98
Proj. Room & House Sup.	25.06
Salary—Manager	75.00
Salary—Operator	45.00
Salaries—Miscl.	60.83
Freight	10.74
Insurance	5.39
Sound Rental	22.62
Rent	200.00
Miscellaneous Expense	1.50
Sound Installation Expense	107.74
Telephone and Telegraph	7.98
Office Supplies	3.41
Postage	3.50
Licenses and Taxes	7.50
Tax on Checks	.46

 Total Expense 1,134.15

 Loss—Coliseum Theatre, Ketchikan.....\$ 60.92

[395]

(Testimony of Charles M. Tuckett.)

September 30, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Receipts 2,397.82

Less Expenses:

Film Rental 526.22

Advt. Bill Posters 94.68

Advt. Newspapers 112.85

Advt. Miscel. 38.78

Heat, Light and Water 85.01

Proj. Room & House Supplies 9.05

Salary—Manager 87.50

Salary—Operator 45.00

Salaries Manager 122.00

Freight 20.86

Insurance 5.39

Sound Rental 90.48

Rent 200.00

Repairs 91.44

Telephone and Telegraph 6.68

Office Supplies 2.83

Postage 2.00

Tax on Checks .56

		1,541.33
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		\$ 856.49
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Profit—Coliseum Theatre, Ketchikan\$ 856.49

(Testimony of Charles M. Tuckett.)

October, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Receipts, Box Office	\$2,369.90
Slide Rental	2.00

Expenses:

Film Rental	691.62
Advt. Bill Posters	113.29
Advt. Newspapers	105.91
Advt. Miscellaneous	79.99
Heat, Light and Power	103.73
Proj. Room & House Sup.	77.29
Salary—Manager	120.56
Salary—Operator	52.50
Salary—Miscl.	290.15
Freight	16.67
Insurance	5.39
Sound Rental	113.10
Rent	200.00
Repairs	29.87
Miscellaneous Expense	52.00
Telephone and Telegraph	17.34
Office Supplies	18.20
Postage	3.50
Uniforms	38.00
Tax on Checks	.67

Total Expense	<u>2,129.78</u>
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Profits—Coliseum Theatre, Ketchikan\$ 242.12

[396]

(Testimony of Charles M. Tuckett.)

November, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Box Office Receipts	1,858.30
Slide Rental	5.00
	<hr/>
	1,863.30

Expenses:

Film Rental	520.75
Advt. B. P.	40.40
Advt. N. P.	100.27
Advt. Misc.	65.64
Heat, Light and Power	119.80
Proj. Room & House Sup.	20.70
Salary—Manager	87.50
Salary—Operator	60.00
Salaries—Misc.	173.62
Freight	16.37
Employees Fidelity Bond	21.36
Insurance	5.39
Sound Rental	90.48
Rent	200.00
Misc. Expense	14.75
Telephone and Telegraph	6.21
Office Supplies	.33
Postage	3.13
Tax on Checks	.91

Total Expenses	<hr/> 1,547.61
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Profit—Coliseum Theatre, Ketchikan\$ 315.69

(Testimony of Charles M. Tuckett.)

December, 1933

COLISEUM THEATRE, Ketchikan, Alaska

Box Office Receipts \$ 666.71

Expenses:

Film Rental	232.00
Advt. B. P.	28.67
Advt. N. P.	67.20
Advt. Misc.	46.26
Heat, Light & Power	100.60
Proj. Room & House Sup.	23.05
Salary—Manager	87.50
Salary—Operator	28.00
Salaries—Misc.	141.90
Freight	12.12
Insurance	11.99
Sound Rental	90.48
Rent	200.00
Telephone and Telegraph	2.49
Postage	1.62
Tax on Checks	.52
Repairs	7.23

Total Expenses	1,081.63
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Loss—Coliseum Theatre, Ketchikan\$ 414.92

[397]

(Testimony of Charles M. Tuckett.)

January, 1934

COLISEUM THEATRE, Ketchikan, Alaska

Box Office \$ 876.30

Expenses:

Film Rental	284.10
Advt. B. P.	20.48
Advt. N. P.	38.52
Rent	200.00
Heat and Light	77.35
Proj. Room & House Sup.	11.98
Salary—Operator	41.00
Salary—Manager	58.34
Freight	16.95
Sound Rental	90.48
Misel. Salaries	105.00
Advt. Misel.	29.32
Tax on Checks	.58
Postage	5.00
Insurance	5.39

Total Expense	984.48
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Loss—Coliseum Theatre, Ketchikan	\$ 108.18
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(Testimony of Charles M. Tuckett.)

February, 1934

COLISEUM THEATRE, Ketchikan, Alaska

Box Office Receipts \$1,258.61

Expenses:

Film Rental	\$ 322.25
Freight	11.50
Adv. B. P.	32.18
Adv. N. P.	62.78
Adv. Misc.	36.01
Salary—Manager	58.34
Salary—Operator	53.00
Salary—Misc.	134.24
Proj. Room & House Sup.	30.76
Rent	200.00
Heat and Light	75.28
Telephone and Telegraph	5.16
Office Supplies	.94
Postage	1.50
Taxes and Licenses	
Tax on Checks	.76
Insurance	5.39
Sound Rental	113.10
Maintenance	1.05

Total Expenses	1,144.24
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Profit—Coliseum Theatre, Ketchikan\$ 114.37

[398]

(Testimony of Charles M. Tuckett.)

March, 1934

COLISEUM THEATRE, Ketchikan, Alaska

Box Office Receipts \$2,811.61

Expenses:

Film Rental 646.10Cost of Added Attractions 252.75Freight 20.33Adv. B. P. 66.36Adv. N. P. 98.61Adv. Misc. 53.80Salary—Manager 93.75Salary—Operator 90.00Salary—Misc. 159.68Proj. Room & House Sup. 78.76Rent 200.00Heat and Light 119.65Telephone and Telegraph 4.75Office Supplies 4.35Postage 7.25Taxes and Licenses 22.57Tax on Checks .63Insurance 10.51Sound Rental 90.48

Repairs on Sound Equipment

Maintenance 12.31

		2,032.64
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		\$ 778.97
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Profit—Coliseum Theatre, Ketchikan\$ 778.97

(Testimony of Charles M. Tuckett.)

April, 1934

COLISEUM THEATRE, Ketchikan, Alaska

Box Office Receipts	\$2,321.30
Slide Rental	6.50
	<hr/>
	2,327.80

Expenses:

Film Rental	616.75
Cost of Added Attractions	14.50
Freight	15.22
Adv. B. P.	78.99
Adv. N. P.	72.15
Adv. Misc.	45.85
Salary—Manager	100.00
Salary—Operator	90.00
Salaries—Misc.	216.11
Proj. Room & House Sup.	145.78
Rent	200.00
Heat and Light	97.35
Telephone and Telegraph	10.03
Office Supplies	6.12
Postage	6.25
Taxes and Licenses	
Tax on Checks	.80
Insurance	15.51
Sound Rental	98.55
Repairs on Sound Equipment	2.28
Maintenance	18.65
Rental of Uniforms	6.00
Travel Expense	

Total Expenses	<hr/>	\$1,856.89
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Profit—Coliseum Theatre, Ketchikan\$ 470.91

[399]

(Testimony of Charles M. Tuckett.)

May, 1934

COLISEUM THEATRE, Ketchikan, Alaska

Box Office Receipts \$2,696.05

Expenses:

Film Rental	631.19
Cost of Added Attractions	84.60
Freight	24.68
Adv. B. P.	42.10
Adv. N. P.	112.52
Adv. Miscel.	44.34
Salary—Manager	100.00
Salary—Operator	90.00
Salaries—Miscel.	207.01
Proj. Room & House Sup.	28.85
Rent	200.00
Heat and Light	81.90
Telephone and Telegraph	9.89
Office Supplies	2.14
Postage	10.21
Taxes and Licenses	9.00
Tax on Checks	.77
Insurance	31.73
Sound Rental	90.48
Repairs on Sound Equip.	
Maintenance	13.00
Rental of Uniforms	6.00
Travel Expense	37.50

Total Expenses	1,857.91
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Profit—Coliseum Theatre, Ketchikan	\$ 838.14
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(Testimony of Charles M. Tuckett.)

November, 1934

COLISEUM THEATRE, Ketchikan, Alaska

Receipts:	\$3,681.15
Expenses:	2,125.83

Profit—Coliseum Theatre, Ketchikan\$1,555.32

December, 1934

COLISEUM THEATRE, Ketchikan, Alaska

Receipts:	\$3,170.76
Expenses:	2,667.61

Profit—Coliseum Theatre, Ketchikan\$ 503.15

Thereupon witness Tuckett read to the jury the respective monthly loss or profit for each month as shown in Exhibit J. [400]

Thereupon witness Tucket further testified: I do not know how long the old equipment was in Ketchikan as I was not in Alaska at the time. Defendant's Exhibit K for identification is our work sheet of capital investment, Juneau Coliseum Theatre.

Whereupon the following proceedings were had:

Mr. HELLENTHAL: I offer it in evidence.

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial, and not the true measure of damages.

The COURT: Overruled. It may be received.

(Testimony of Charles M. Tuckett.)

Mr. ROBERTSON: It hasn't been shown to contain the original entries or to be based on the original entries.

Mr. HELLENTHAL: We will make that showing.

The COURT: I was assuming that.

Mr. HELLENTHAL: We will make that showing, Your Honor.

The COURT: It will be admitted with that understanding.

Mr. ROBERTSON: Exception.

Whereupon said document was received in evidence, marked Defendant's Exhibit K, and reads as follows: [401]

TRE—JUNEAU.

	1932		1933
	Cap. Invest.	Deprec.	Cap. Invest.
Year -			
Improv			
Amend ⁰		1,150.00	
5% De ⁰		850.00	
Capital	17,400.00		15,400.00
Furnit			
Acquir			
Amend ⁰		2,100.00	
	4,200.00		2,100.00
Organ ⁰	9,100.00	1,300.00	7,800.00
Machin			
Amend			
Sound ⁰	6,875.00	1,100.00	5,775.00
193.....			
ref ⁰	2,800.00	300.00	250.00
Deprec ⁰		6,800.00	
Cap. I	40,375.00		33,575.00
	2,422.50		2,014.50
	201.87		167.88

(Testimony of Charles M. Tuckett.)

Mr. ROBERTSON: It hasn't been shown to contain the original entries or to be based on the original entries.

Mr. HELLENTHAL: We will make that showing.

The COURT: I was assuming that.

Mr. HELLENTHAL: We will make that showing, Your Honor.

The COURT: It will be admitted with that understanding.

Mr. ROBERTSON: Exception.

Whereupon said document was received in evidence, marked Defendant's Exhibit K, and reads as follows: [401]

DEFENDANT'S EXHIBIT K.

SCHEDULE OF CAPITAL INVESTMENT & DEPRECIATION RESERVE—COLISEUM THEATRE—JUNEAU.

	Initial Cost	1929		1930		1931		1932		1933	
		Deprec. Reserve	Cap. Invest.	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.	Deprec.	Cap. Invest.
Year - 1921	23,000.00										
Improvements - 1924	17,000.00										
	<u>40,000.00</u>										
Amended 12/31/29 5%		11,500.00		1,150.00		1,150.00		1,150.00		1,150.00	
5% Deprec. on \$17,000.00 5%		5,100.00		850.00		850.00		850.00		850.00	
Capital Invest., Less Deprec.			23,400.00		21,400.00		19,400.00		17,400.00		15,400.00
Furniture & Fixtures)											
Acquired in 1925)	21,000.00										
Amended Reserve 10%		10,500.00		2,100.00		2,100.00		2,100.00		2,100.00	
			10,500.00		8,400.00		6,300.00		4,200.00		2,100.00
Organ - 1929	13,000.00	None	13,000.00	1,300.00	11,700.00	1,300.00	10,400.00	1,300.00	9,100.00	1,300.00	7,800.00
Machinery - Cost - 1921	5,000.00										
Amended Reserve 1929 10%		4,500.00									
			500.00	500.00	None	—	—	—	—	—	—
Sound Equipment	11,000.00	825.00	10,175.00	1,100.00	9,075.00	1,100.00	7,975.00	1,100.00	6,875.00	1,100.00	5,775.00
193... Sound Improvement & replacement 10%	—	—	—	—	—	—	3,000.00	200.00	2,800.00	300.00	250.00
Depreciation Taken		32,425.00		7,000.00		6,500.00		6,700.00		6,800.00	
Cap. Investment - Balance	90,000.00		57,575.00		50,575.00		47,075.00		40,375.00		33,575.00
		6%	3,454.50		3,034.50		2,824.50		2,422.50		2,014.50
		Monthly	287.87		252.87		235.38		201.87		167.88

(Testimony of Charles M. Tuckett.)

Thereupon defendant's Exhibits marked K-1 to K-5, both inclusive, for identification, were handed to witness Tuckett, who testified that said Exhibit K-1 was profit and loss statement and work sheet covering defendant's Juneau Theatre for 1929, K-2 for 1930, K-3 for 1931, K-4 for 1932, and K-5 for the first four months of 1933.

Whereupon said documents were offered in evidence, to which plaintiff objected on the ground that each of them was incompetent, irrelevant and immaterial and not the true measure of damages, which objection was overruled and to each of which rulings plaintiff then excepted, whereupon said documents were received in evidence, marked respectively, defendant's Exhibits K-1, K-2, K-3, K-4, and K-5, and read respectively, as follows:

(Testimony of Charles M. Tuckett.)

EXHIBIT No. K-1

PROFIT AND LOSS STATEMENT

1929

COLISEUM THEATRE

Juneau, Alaska

	Total Receipts	Total Expenses	Net Profits	Net Loss
January	\$ 2,612.35	\$ 2,222.44	\$ 389.91	
February	2,418.00	2,056.36	361.64	
March	2,589.85	2,353.69	236.16	
April	3,061.56	2,125.52	936.04	
May	4,506.40	2,185.70	2,320.70	
June	4,025.00	2,369.29	1,655.71	
July	6,308.40	3,175.80	3,132.60	
August	5,547.15	3,846.33	1,700.82	
September	5,393.35	3,237.23	2,156.12	
October	5,501.71	4,020.55	1,481.16	
November	6,068.02	3,053.56	3,014.46	
December	4,985.99	3,537.45	1,448.54	
	<hr/> \$53,017.78	<hr/> \$34,183.92	<hr/> \$18,833.86	
	34,183.92			
Proof	<hr/> \$18,833.86			

Memorandum:

Net Profit for year 1929	\$18,833.86
(Less) Depreciation for year 1929	5,700.00
	<hr/>
Total Net Profit for year 1929	\$13,133.86
	<hr/> <hr/>

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JAN. 1929.

Working sheet shows following items:

Wages: H. Sinclair, \$35.00—Z. Gross, \$50.00—
Leon Drews, \$114.20—Chas. Tuckett, \$100.00—
Geo. Cortez, \$28.70—L. Lemmieux, \$100.00.

Film Rental Acct: Warner Bros. 50%, \$291.75—
Educational Films, \$51.25—United Artists
Corp., \$188.74—Pathe Film Exchange, \$416.82.

Film Freight Expense: Pacific S. S. Co., \$39.00.

General Expense: Alaska S. S. Co., \$7.50.

Insurance & Taxes: 1/12 of Taxes on Theatre.

Rental: Rental all 6%, \$287.87.

General Replacement & Repairs: Cap. Electric Co.,
\$13.63—Juno. Lmb. Co., \$30.36—Thos. Hdwe.,
\$11.30—Juno. Young Hdwe., \$15.60—Stand.
Furn. Co., \$60.00.

Adv: Empire Printg. Co., \$96.80—Harrisons Re-
ports, \$12.00—Exhibitor Herald, \$3.00.

Lights, Water, Tele: Telephone, \$10.00—Juno
Water Co., \$6.00—A. E. L. & P. Co., \$135.55.

Heat: Standard Oil Co., \$21.37—Cole Transfer,
\$16.50—Service Transfer, \$16.50.

Gross Receipts:\$2612.35

Totals: Wages, \$427.90

Film Rental Acct., \$948.56

Film Freight Expense, \$39.00

General Expense, \$7.50

Insurance & Taxes, \$63.00

(Testimony of Charles M. Tuckett.)

Rental, \$287.87

General Replacement & Repairs, \$130.89

Adv., \$111.80

Lights, Water, Tele., \$151.55

Heat, \$54.37

Total..... 2222.44

Net Profit.....\$ 389.91

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: L. Lundstrom—Al. Lundstrom—L. Lemmieux—Chas. Tuckett—Leon Drews—Geo. Cortez. [404]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR FEB., 1929

Working sheet shows following items:

Wages: Leon Drews, \$114.20—Chas. Tuckett, \$100.00—Geo. Cortez, \$55.00—L. Sinclair, \$35.00—Z. Gross, \$50.00.

Film Rental: United Artists 50%, \$79.70—Educational Films 50%, \$51.25—Famous Players, Lasky 50%, \$56.20—Pathe Film Exchange 50%, \$104.96—Famous Players Lasky 50%, \$232.08—Educational Films 50%, \$64.25.

Film Freight Expense: Juneau Transfer, \$51.00—Pac. S. S. Co., \$45.30—Alaska S. S. Co., \$14.20
Gross Transfer, \$20.79.

(Testimony of Charles M. Tuckett.)

General Expense: Juno Chamber of Commerce,
 \$10.00—A. J. M. C., \$5.09—J. B. Burford Co.,
 \$3.00—B. F. Shearer, \$66.40.

General Replacement, Repairs: Harris Hdwe.
 Co., \$52.85—Juno Young Hdwe., \$20.25—Thos.
 Hdwe., \$35.14—Juno Lumber, \$73.20.

Advertising: Juno Chamber of Commerce, \$40.00
 —Empire Prntg. Co., \$76.70—Western Poster
 Co., 50%, \$13.09.

Lights, Water, Tele: Juno Water, \$6.50—A. E. L.
 & P. Co., \$138.70—Juno Telephone, \$10.00.

Heat: Standard Oil Co., \$19.68—Cole Transfer
 Co., \$11.50.

Insurance & Taxes: Allen Shattuck, \$49.50—City
 of Juneau, 1/12 of taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$2418.00

Totals: Wages, \$354.20

Film Rental, \$588.44

Film Freight Expense \$131.29

General Expense, \$84.49

General Replacements, Repairs, \$181.44

Advertising, \$129.79

Lights, Water, Tele., \$155.20

Heat, \$31.18

Insurance & Taxes, \$112.50

Rental, \$287.87—Total 2056.36

Net Profit\$ 361.64

(Testimony of Charles M. Tuckett.)

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: Al Lundstrom—Harry Gabin—Chas. Tuckett—Leon Drews—Geo. Cortez—L. Lemmieux. [405]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MARCH, 1929.

Working sheet shows following items:

Wages. L. Lemmieux, \$100.00—Geo. Cortez, \$60.00—Chas. Tuckett, \$100.00—L. Sinclair, \$35.00—Z. Gross, \$50.00—Dick McGinn, \$77.16.

Film Rental: Columbia Film Exch. 50%, \$105.00—Pathe Film 50%, \$215.18—Columbia Film Exch. 50%, \$24.88—United Artists 50%, \$169.82—Warner Bros., 50%, \$152.90.

Film Freight: Jacks Transfer, \$5.25—Alaska S. S. Co., \$196.00.

General Expense: None.

Replacements, Repairs Preparatory to Sound Equipment: Juneau Paint, \$5.25—Cap. Elec., \$5.83—Thomas Hdwe., \$1.90—Juno Lmb. Co., \$24.00—A. M. Geyer, \$88.00—Juno Young Hdwe., \$61.25—Handy Andy, \$10.70.

Adv: Empire Printg. Co., \$68.15.

Lights, Water, Tele: A. E. L. & P. Co., \$363.44—Juno Water Co., \$6.50—Juno Tele. Co., \$9.50.

Heat: Standard Oil, \$10.11—Cash Cole, \$9.00.

(Testimony of Charles M. Tuckett.)

Ins. & Taxes: Allen Shattuck, \$48.00—1/12 Taxes
City, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$2589.85

Totals: Wages, \$422.16

Film Rental, \$667.78

Film Freight, \$201.25

General Expense, None

Replacements, Repairs preparatory to sound
equipment, \$196.93

Adv. \$68.15

Lights, Water, Tele., \$379.44

Heat, \$19.11—Ins. & Taxes, \$111.00

Rental, \$287.87—Total 2353.69

Net Profit.....\$ 236.16

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: Al Lundstrom—L. Lemmieux — Geo. Cortez — Dick McGinn — Chas. Tuckett. [406]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR APRIL, 1929.

Working sheet shows following items:

Wages: Chas. Tuckett, \$100.00—Geo. Cortez, \$60.00—L. Sinclair, \$35.00—Z. Gross, \$50.00—Dick McGinn, \$96.43.

Film Rental: Pathe Film 50%, \$152.56—United Artists 50%, \$223.59—Famous Players Lasky 50%, \$251.56—Fox Film 50%, \$353.27—Educational Film 50%, \$51.25.

Film Frt: Jacks Transfer, \$7.00—Alaska S. S. Co., \$46.00—Aaa. S. S. Co., \$21.06—Pac. S. S. Co., \$34.40—Educational Film 50%, \$51.25.

General Expense: S. P. Johnson & Son, \$13.50—U. S. Signal Co., \$5.40.

Wages, Replacement & Repairs Preparatory to Sound Equip: None.

Adv: Western Poster, \$31.90.

Lights, Water, Tele: A. E. L. & P. Co., \$144.20—Juno Tele. Co., \$8.00.

Heat: Stand. Oil Co., \$36.28.

Ins. & Taxes: Taxes City 1/12, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$3061.56

Totals: Wages, \$341.43

Film Rental, \$1032.23

Film Frt., \$159.71

General Expense, \$18.90

Wages, Replacement & Repairs preparatory to Sound Equip., None

(Testimony of Charles M. Tuckett.)

Adv., \$31.90

Lights, Water, Tele., \$152.20

Heat, \$36.28

Ins. & Taxes, \$63.00

Rental, \$287.87—Total 2125.52

Net Profit.....\$ 936.04

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: Chas. Tuckett—Geo. Cortez—Dick McGinn. [407]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MAY, 1929.

Working sheet shows following items:

Wages: Z. Gross, \$50.00—Dick McGinn, \$90.00—Geo. Cortez, \$60.00—L. Sinclair, \$35.00—Chas. Tuckett, \$100.00—Usher, \$3.50.

Film Rental: United Artists 50%, \$152.47—Fox Film 50%, \$539.17—Warner Bros., 50%, \$618.07—Educational Film 50%, \$64.25.

Film Frt: City Wharf, \$68.83—Jacks Transfer, \$11.75—Pacific S. S. Co., \$10.19—City Wharf, \$16.44—J. Gross Transfer, \$18.31.

General Expense: J. B. Burford Co., \$9.50—Empire Prntg Co., \$2.50—U. S. Signal Corps, \$27.35.

(Testimony of Charles M. Tuckett.)

Wages, Replacements & Repairs Preparatory to
Sound Equip: Capital Elec., \$13.54—Thomas
Hdwe., \$25.95—Juneau Lumber, \$14.71—Na-
tional Theater Supply Co., \$6.25.

Adv: Jerry Davis, \$5.65—Empire Printg. Co.,
\$63.65—Empire Printg. Co., \$60.35.

Lights, Water, Tele: A. E. L. & P. Co., \$113.65
—Juneau Water, \$14.00.

Heat: Cash Cole, \$19.00—Standard Oil, \$20.75.

Ins. Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$4506.40

Totals: Wages, \$338.50

Film Rental, \$973.96

Film Frt, \$125.52

General Expense, \$39.35

Wages, Replacements & Repairs preparatory to
Sound Equip., \$60.45—Adv. \$129.65

Lights, Water, Tele., \$127.65

Heat, \$39.75

Ins., Taxes, \$63.00

Rental, \$287.87—Totals 2185.70

Profit.....\$2320.70

The following names are also listed on said work
sheet, but no amount appears opposite them under
any place on said sheet, viz: Chas. Tuckett (2)—
Geo. Cortez—L. Lemmieux—Dick McGinn (2).

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JUNE, 1929.

Working sheet shows following items:

Wages: L. Sinclair, \$35.00—O. M. Lemmieux, \$75.00—Z. Gross., \$50.00—Dick McGinn, \$91.00.

Film Rental: Fox Film Corp., 50%, \$392.87—United Artists Corp., 50%, \$266.65—Pathe Film Exch., 50%, \$113.24—Educational Film 50%, \$23.37—Educational Film 50%, \$20.00—Warner Bros., 50%, \$293.96.

Film Freight: Pac. S. S. Co., \$15.50—Alaska S. S. Co., \$15.50—Pac. S. S. Co., \$15.50—Pac. S. S. Co., \$8.81—City Wharf, \$4.50.

General Expense: J. B. Burford, \$9.50—U. S. Signal Corps, \$13.50.

Replacements & Repairs: Thos. Hdwe. Co., \$4.60.

Adv: Empire Printg. Co., \$122.70—Douglas Hi School, \$5.00.

Lights, Water, Tele: A. E. L. & P. Co., \$179.29—Juneau Water Co., \$5.50.

Heat: Standard Oil Co., \$20.75—Cash Cole Transfer, \$6.50—Reliable Transfer, \$1.50—Union Oil Co., \$10.39—Standard Oil, \$20.79.

Ins. & Taxes: City of Juneau, \$10.00—City of Juneau, \$10.00—1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$4025.00

Totals: Wages, \$428.50
 Film Rental, \$1110.09
 Film Freight, \$59.81

(Testimony of Charles M. Tuckett.)

General Expense, \$23.00	
Replacement, Repairs, \$4.60	
Adv., \$127.70	
Lights, Water, Tele., \$184.79	
Heat, \$59.93—Ins. & Taxes, \$83.00	
Rental, \$287.87—Total	2369.29
	<hr/>
Net Profit	\$1655.71

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: O. M. Lemmieux—L. Lemmieux—Geo. Cortez—Dick McGinn. [409]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JULY, 1929.

Working sheet shows following items:

Wages: Geo. Cortez, \$70.00—Z. Gross, \$50.00—Dick McGinn, \$96.45—D. Sinclair, \$35.00—O. M. Lemmieux, \$75.00.

Film Rental: United Artists 50%, \$75.00—Educational Film 50%, \$91.25—Pathe Film 50%, \$101.57—B. M. Behrends Bank 50%, \$705.34—Vitaphone Corpn., 50%, \$437.01—Vitaphone Corpn., 50%, \$362.50—Vitaphone Corpn., 50%, \$82.50—Vitaphone Corpn., 50%, \$68.59.

Film Freight: J. Gross Transfer, \$69.82—City Wharf, \$14.42.

General Expense: None.

(Testimony of Charles M. Tuckett.)

Replacement & Repairs: First Nat. Bank, \$159.15

—National Theatre Supply, \$13.77.

Adv: Empire Printg. Co., \$77.40.

Lights, Water, Tele: Juno.-Doug. Tele. Co., \$5.25

—A. E. L. & P. Co., \$96.26—Juneau Water Co., \$2.84—Juneau Water Co., \$7.00.

Heat: Standard Oil Co., \$20.45—Cash Cole, \$7.50.

Ins. & Taxes: City of Juneau, \$22.32—City of Juneau, \$78.54—1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$6308.40

Totals: Wages, \$326.45

Film Rental, \$1923.76

Film Freight, \$84.24

General Expense, None

Replacement & Repairs, \$172.92

Adv., \$77.40

Lights, Water, Tele., \$111.35

Heat, \$27.95—Ins. & Taxes, \$163.86

Rental, \$287.87—Total 3175.80

Net Profit.....\$3132.60

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: L. C. Lemmieux—Geo. Cortez—Dick McGinn—O. M. Lemmieux. [410]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR AUGUST, 1929.

Working sheet shows following items:

Wages. J. Lemmieux, \$100.00—S. Sinclair, \$40.00—
Z. Gross, \$50.00—Dick McGinn, \$102.88—Geo.
Cortez, \$70.00—Geo. Cortez, \$17.25—O. M. Lem-
mieux, \$75.00—Geo. Cortez, \$10.00.

Film Rental: United Artists 50%, \$200.00—Fox
Film 50%, \$554.51—Vitaphone Corpn. 50%,
\$189.95—Warner Bros. 50%, \$457.90—Fox
Film Corpn. 50%, \$799.51—Warner Bros. 50%,
\$205.02—Pathe Film Exchange 50%, \$65.36—
Columbia Film Exch. 50%, \$14.04—Columbia
Film Exch. 50%, \$22.58—Columbia Film Exch.
50%, \$55.00—Educational Film Exch. 50%,
\$42.70.

Film Freight: Jacks Transfer, \$6.75—Gross Trans-
fer, \$7.97.

General Expense: Alaska Weekly, \$5.00.

Replacement & Repairs: D. E. Sheriff, \$5.00—
National Theatre Supply, \$8.10.

Adv: Empire Printg. Co., \$121.20.

Lights, Water, Tele: Juno Tele. Co., \$8.00—A. E.
L. & P. Co., \$135.35—Juno Water Co., \$2.00.

Heat: Stand. Oil Co., \$20.74—Union Oil Co. \$10.89
—North Transfer, \$2.00.

Ins. & Taxes: City of Juneau, Street Assessment
1/10, \$50.76—1/12 City Taxes. \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$5547.15

(Testimony of Charles M. Tuckett.)

Totals: Wages, \$505.13	
Film Rental, \$2606.57	
Film Freight, \$14.72	
General Expense, \$5.00	
Replacement & Repairs, \$13.10	
Adv., \$121.20	
Lights, Water, Tele., \$145.35	
Heat, \$33.63—Ins. & Taxes, \$113.76	
Rental, \$287.87—Total	3846.33
	<hr/>
Net Profit.....	\$1700.82

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: O. N. Lemmieux—Dick McGinn—L. C. Lemmieux. [411]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR SEPT. 1929.

Working sheet shows following items:

Wages: Dick McGinn, \$96.45—J. Gaualko, \$70.00—O. M. Lemmieux, \$187.50—O. M. Lemmieux, \$6.25—Mrs. Sinclair, \$45.00—Z. Gross, \$60.00—C. M. Tuckett, \$112.50.

Film Rental: Vitaphone Corpn. 50%, \$359.02—United Artists 50%, \$275.00—B. M. Behrend, draft film, 50%, \$401.17—Columbia Exchange 50%, \$13.45—Columbia Exchange 50%, \$55.00—Pathe Exchange 50%, \$25.00—Columbia Exchange 50%, \$85.85—Warner Bros. 50%,

(Testimony of Charles M. Tuckett.)

\$332.00—Educational Films 50%, \$40.00—Tiffany Stahl Prod., 50%, \$53.10—Pathe Exchange 50%, \$136.21—Vitaphone Corpn., 50%, \$362.90.

Film Freight: Jacks Transfer, \$18.75.

General Expense: Weldon Williams, Lick, \$17.00.

Replacement & Repairs: A. M. Geyer, \$2.11.

Adv: Empire Printg. Co., \$71.55.

Lights, Water, Tele: Juneau Water Co., \$4.00—A. E. L. & P. Co., \$118.60—Juno Tele. Co., \$10.00.

Heat: Standard Oil Co., \$20.45—Cole Transfer, \$7.50.

Ins. Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$5393.35

Totals: Wages, \$477.70

Film Rental, \$2138.70

Film Freight, \$18.75

General Expense, \$17.00

Replacement & Repairs, \$2.11

Adv., \$71.55

Lights, Water, Tele., \$132.60

Heat, \$27.95—Ins. Taxes, \$63.00

Rental, \$287.87—Total 3237.23

Net Profit.....\$2156.12

The following names are also listed on said work sheet, but no amount appears opposite them under any place on said sheet, viz: John Gaualko—O. M. Lemmieux—C. M. Tuckett—Dick McGinn. [412]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR OCT., 1929.

Working sheet shows following items:

Wages: Dick McGinn, \$96.45—John Gawalko, \$70.00—O. M. Lemmieux, \$87.50—O. M. Lemmieux, \$6.25—L. Sinclair, \$50.00—Z. Gross, \$60.00—Chas. Tucket, \$112.50.

Film Rental: Paramount 50%, \$1007.59—United Artists 50%, \$300.00—Columbia Film 50%, \$80.60—Tiffany Stahl 50%, \$10.00—Educational Film 50%, \$60.00—Paramount 50%, \$489.36—Fox Film Corpn., 50%, \$231.67.

Film Freight: J. Gross Transfer, \$51.32—Pac. S. S. Co., \$17.69—City Wharf, \$21.00.

General Expense: None.

Replacement, Repairs: Elec. Research Prod., \$16.27—National Theatre Supply, \$24.73.

Adv: Juneau Cold Storage, \$2.00—Empire Printg. Co., \$80.40—Alaska Fair Assn., \$5.00.

Lights, Water, Tele: A. E. L. & P. Co., \$200.25—Juneau Water, \$4.00—Juno Tele. Co., \$3.00.

Heat: North Transfer, \$2.50—Standard Oil Co., \$40.74.

Ins. Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$5501.71

Totals: Wages, \$482.70

Film Rental, \$2718.08

Film Freight, \$90.01

(Testimony of Charles M. Tuckett.)

General Expense, None	
Replacement, Repairs, \$41.00	
Adv., \$87.40	
Lights, Water, Tele., \$207.25	
Heat, \$43.24—Ins. Taxes, \$63.00	
Rental, \$287.87—Total	4020.55
	<hr/>
Net Profit.....	\$1481.16
	[413]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR NOV. 1929.

Working sheet shows following items:

Wages: Z. Gross, \$60.00—John Gawalko, \$70.00—L. Sinclair, \$40.00—N. Lemmieux, \$87.50—Dick McGinn, \$102.88—C. Tuckett, \$112.50—N. Lemmieux, \$6.25.

Film Rental: Warner Bros. 50%, \$132.50—Fox Film 50%, \$442.79—Columbia Film 50%, \$95.00—Vitaphone Corpn. 50%, \$362.20—Warner Bros. 50%, \$305.87—Paramount Film 50%, \$358.69—Pathe Film 50%, \$219.17.

Film Freight: City Wharf, \$21.94—Jacks Transfer, \$9.75—Pac. S. S. Co., \$17.41.

General Expense: None.

Replacement, Repairs: Juno Young Hdwe., \$2.95—National Theatre Supply, \$5.00—Thos. Hdwe., \$5.16—Electrical Research Prod., \$4.90.

(Testimony of Charles M. Tuckett.)

Adv: Empire Printg. Co., \$5.00—Empire Printg. Co., \$91.90—Juno Cold Storage, \$2.00.

Lights, Water, Tele: Juno Water Co., \$4.00—

Juno Tele. Co., \$3.00—A. E. L. & P. Co., \$93.65.

Heat: Union Oil Co., \$40.68.

Ins., Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$6068.02

Totals: Wages, \$479.13

Film Rental, \$1916.22

Film Freight, \$49.10

General Expense, None

Replacement, Repairs, \$18.01

Adv., \$98.90

Lights, Water, Tele., \$100.65

Heat, \$40.68—Ins. Taxes, \$63.00

Rental, \$287.87—Total 3053.56

Net Profit.....\$3014.46

[414]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR DEC. 1929.

Working sheet shows following items:

Wages: John Gawalko, \$70.00—J. Gross, \$60.00—

D. McGinn, \$96.45—Ned Lemnieux, \$93.75—L.

Sinclair, \$45.00—Chas. Tuckett, \$112.50.

Film Rental: Educational Film 50%, \$84.35—Fa-

mous Lasky 50%, \$1092.40—Columbia Film

(Testimony of Charles M. Tuckett.)

50%, \$72.02—Pathe Film Exch. 50%, \$259.86—
Fox Film 50%, \$366.60—Vitaphone Corpn 50%,
\$248.75—Tiffany Stahl 50%, \$8.10.

Film Freight: J. Gross Transfer, \$79.12—Pac. S.
S. Co., \$9.96.

General Expense: Film Daily, \$10.00—Empire
Printg Co., \$6.50—Chas. Tuckett, \$25.00—Neil
Lemieux, \$25.00—Dick McGinn, \$10.00—
John Gawalko, \$10.00—L. Sinclair, \$10.00.

Replacement, Repairs: Juno Young Hdwe., \$13.10
Thos. Hdwe., \$7.16—Elec. Research Prod.
\$68.42—O. Jensen, \$35.72.

Adv: Empire Printing Co., \$85.70—Juno Cold
Storage, \$2.00.

Lights, Water, Tele: Juno Water Co., \$4.00—A. E.
L. & P. Co., \$131.97—Juno Tele. Co., \$3.00.

Heat: Union Oil, \$40.50.

Ins., Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$287.87.

Gross Receipts:\$4985.99

Totals: Wages, \$477.70

Film Rental, \$2132.08

Film Freight, \$89.08

General Expense, \$96.50

Replacement, Repairs, \$124.40

Adv., \$87.70

Lights, Water, Tele., \$138.97

Heat, \$40.50—Ins., Taxes, \$63.00

Rental, \$287.87—Total 3537.45

Net Profit.....\$1448.54

(Testimony of Charles M. Tuckett.)

Witness Tuckett read to the jury the first page of defendant's Exhibit K-1 and testified that the items of expense shown on the work sheets attached thereto were taken from the books offered in evidence; that those books contained other items besides these, that it is just the same as these books; that he knows of his own personal knowledge what items belong to the Juneau Coliseum theatre; that he figured from the total items in the books those items only in making up these statements; that he knows from his own personal knowledge that those were the only items that belonged to the Juneau Coliseum theatre for 1929, and that that goes for all other statements that he had prepared that are to be offered in evidence. [415]

(Testimony of Charles M. Tuckett.)

EXHIBIT No. K-2

PROFIT AND LOSS STATEMENT

1930

COLISEUM THEATRE

Juneau, Alaska

	Total Receipts	Total Expenses	Net Profits	Net Loss
January	\$ 4,633.35	\$ 3,696.66	\$ 936.69	
February	3,757.91	3,481.83	276.08	
March	3,674.55	2,416.69	1,257.86	
April	4,991.35	1,890.57	3,100.78	
May	4,324.10	4,032.82	291.28	
June	4,219.28	2,885.59	1,333.69	
July	4,295.50	3,410.02	885.48	
August	4,458.06	2,324.46	2,133.60	
September	4,955.15	2,065.30	2,889.85	
October	4,861.79	3,051.47	1,810.32	
November	3,907.90	3,002.30	905.60	
December	5,517.55	3,168.19	2,349.36	
	<hr/>	<hr/>	<hr/>	<hr/>
	\$53,596.49	\$35,425.90	\$18,170.59	
	35,425.90			
Proof	<hr/>			
	\$18,170.59			

Memorandum:

Net Profit for year 1930	\$18,170.59
((Less) Depreciation taken for 1930	7,000.00
	<hr/>
Net Profit for year 1930	\$11,170.59

[416]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JANUARY, 1930.

Working sheet shows following items:

Wages: N. Lemmieux, \$93.75—Dick McGinn, \$102.88—John Gawalko, \$70.00—Chas. Tuckett, \$112.50—L. Sinclair, \$45.00—Z. Gross, \$60.00.

Film Rental: Tiffany Stahl 50%, \$55.00—Pathe Film Exchange 50%, \$300.50—Tiffany Stahl 50%, \$38.10—Warner Bros. 50%, \$311.20—Educational Film 50%, \$30.00.

Film Freight: City Wharf, \$20.15—Jacks Transfer, \$7.25.

General Expense: Electrical Research, \$301.10; J. C. Hayes Shop, \$3.15; Electrical Research Prod. 50%, \$3.42; Do, 50%, \$171.00; Do, 50%, \$509.50; Do, 50%, \$480.30.

Replacements and Repairs: Thomas Hdwe., \$12.63—National Theater Supply, \$38.93.

Advertising: Empire Printing Co., \$125.35; Western Poster Co., \$5.81; Juno Cold Storage, \$2.00.

Lights, Water, Tele: A. E. L. & P. Co., \$189.49; Juno Water Co., \$4.00; Juneau Tele., \$3.00.

Heat: Union Oil Co., \$41.78.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$4,633.35

Totals: Wages, \$484.13

Film Rental, \$734.80

Film Freight, \$27.40

General Expense, \$1,468.47

(Testimony of Charles M. Tuckett.)

Replacements and Repairs, \$51.56

Advertising, \$133.16

Lights, Water, Tele., \$196.49

Heat, \$41.78

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 3,696.66

 Net Profit.....\$ 936.69

[417]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR FEBRUARY, 1930.

Working sheet shows following items:

Wages: Z. Gross, \$35.00—John Gawalko, \$75.00—
Ned Lemmieux, \$100.00—L. Sinclair, \$45.00—
Chas. Tuckett, \$125.00.

Film Rental: Mickey Carney, \$25.00—Paramount
Films 50%, \$712.16—Fox Film Co. 50%, \$151.87
Vitaphone Corpn. 50%, \$510.00—Educational
Films 50%, \$61.57—Vitaphone Corpn. 50%,
\$325.45—Famous Players Lasky 50%, \$318.59
—Warner Bros. 50%, \$134.80—Pathe Exchange
50%, \$149.44.

Film Freight: Pacific S. S. Co., \$25.75—J. Gross
Transfer Co., \$41.15.

General Expense: Harrison Reports, \$16.00—
Hawkwooch Chemical Co., \$17.50.

Replacements and Repairs: None.

Advertising: Alaska Empire, \$99.35.

(Testimony of Charles M. Tuckett.)

Lights, Water, Tele: Juneau Water Co., \$4.00—

A. E. L. & P. Co., \$136.70—Juno Tele Co., \$3.00.

Heat: Union Oil Co., \$40.78—Worth Transfer,
\$12.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$3,757.91

Totals: Wages, \$380.00

Film Rental, \$2,388.98

Film Freight, \$66.90

General Expense, \$33.50

Advertising, \$99.35

Lights, Water, Tele., \$143.70

Heat, \$53.53

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 3,481.83

Net Profit.....\$ 276.08

[418]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MARCH, 1930.

Working sheet shows following items:

Wages: Mickey Carney, \$25.00—Ned Lemmieux,
\$100.00—B. W. Burke, \$50.00—Z. Gross, \$35.00
—L. Sinclair, \$45.00—C. Tuckett, \$125.00—J.
Gaualko, \$75.00.

Film Rental: Pathe Exchange 50%, \$183.97—Tif-
fany Stahl 50%, \$42.94—Paramount Exchange
50%, \$651.41—Educational Film 50%, \$31.57—

(Testimony of Charles M. Tuckett.)

Warner Bros. 50%, \$82.50—Vitaphone Corpn.
50%, \$374.42.

Film Freight: Pac. S. S. Co., \$15.26.

General Expense: A. M. Simpkins, \$2.55.

Replacements and Repairs: Juno Young, \$10.10.

Advertising: Empire Printg., \$93.45.

Lights, Water, Tele.: Juno Water, \$4.00—A. E. L.
& P. Co., \$130.30—Juno Tele., \$3.00.

Heat: Union Oil, \$20.35.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$3,674.55

Totals: Wages, \$455.00

Film Rental, \$1,366.81

Film Freight, \$15.26

General Expense, \$2.55

Replacements and Repairs, \$10.10

Advertising, \$93.45

Light, Water, Tele., \$137.30

Heat, \$20.35

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 2,416.69

Net Profit.....\$1,257.86

[419]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR APRIL, 1930.

Working sheet shows following items:

Wages: Ned Lemmieux, \$100.00—B. W. Burke, \$75.00—Z. Gross, \$35.00—L. Sinclair, \$45.00—J. Gawalko, \$75.00—Chas. Tuckett, \$125.00—Alaska S. S. Co., \$21.25—Mickey Carney, \$25.00.

Film Rental: Fox Film Corpn. 50%, \$585.33—Educational Film 50%, \$29.60—Pathe Film 50%, \$123.42.

Film Freight: Jack's Transfer, \$12.00.

General Expense: None.

Replacements and Repairs: Elec. Research Prod., \$31.00.

Advertising: Juno Empire, \$115.95.

Lights, Water, Tele.: A. E. L. & P. Co., \$128.40—Juno Water, \$4.00—Juneau Telephone, \$3.00.

Heat: Union Oil, \$40.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$4,991.35

Totals: Wages, \$501.25

Film Rental, \$738.35

Film Freight, \$12.00

Replacements and Repairs, \$31.00

Advertising, \$115.95

Light, Water, Tele., \$135.40

Heat, \$40.75

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 1,890.57

Net Profit.....\$3,100.78

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MAY, 1930.

Working sheet shows following items:

Wages: John Gaualko, \$70.00—Z. Gross, \$35.00—
Ned Lemmieux, \$100.00—L. Sinclair, \$45.00—
Mariel Jarman, \$25.00—Chas. Tuckett, \$125.00.

Film Rental: First National Films 50%, \$308.15—
Vitaphone Corpn 50%, \$422.50—Warner Bros.
Films 50%, \$757.27—Fox Film 50%, \$582.03—
Pathe Film 50%, \$68.75—Tiffany Exchange
50%, \$67.95—Educational Film 50%. \$51.57—
Vitaphone Corpn. 50%, \$867.58.

Film Freight: Alaska S. S. Co., \$10.00.

General Expense: None.

Replacements and Repairs: None.

Advertising: None.

Lights, Water, Tele.: A. E. L. & P. Co., \$177.15—
Juneau Telephone, \$4.00.

Heat: None.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$4,324.10

Totals: Wages, \$400.00

Film Rental, \$3,125.80

Lights, Water, Tele., \$181.15

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 4,032.82

Net Profit.....\$ 291.28

[421]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JUNE, 1930.

Working sheet shows following items:

Wages: Z. Gross, \$35.00—L. Sinclair, \$45.00—M. Jarman, \$25.00—Ned Lemmieux, \$100.00—B. W. Burke, \$75.00—J. Gaualko, \$50.00—E. B. Clayton, \$75.00—Chas. Tuckett, \$125.00—Mrs. Davis, \$30.00.

Film Rental: Vitaphone Corpn. 50%, \$579.00—Warner Bros. 50%, \$373.47—1st National Film 50%, \$170.50—Pathe Exchange 50%, \$190.22—Educational Film 50%, \$42.50.

Film Freight: Aaa. S. S. Co., \$23.21—Jack's Transfer, \$10.05.

General Expense: Pac. Coast Stamp Wks., \$1.90—Film Daily, \$10.00.

Replacement and Repairs: National Theater Supply, \$15.57.

Advertising: Alaska Empire, \$311.05—Chamber of Commerce, \$50.00—Western Poster, \$30.60.

Lights, Water, Tele.: Juno Water Works, \$8.00—A. E. L. & P. Co., \$149.90—Juno Tele., \$3.00.

Heat: Union Oil Co., \$40.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$4,219.28

Totals: Wages, \$560.00

Film Rental, \$1,355.69

Film Freight, \$33.26

General Expense, \$11.90

(Testimony of Charles M. Tuckett.)

Replacement and repairs, \$15.57

Advertising, \$391.65

Lights, Water, Tele., \$160.90

Heat, \$40.75

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 2,885.59

Net Profit.....\$1,333.69

[422]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JULY, 1930.

Working sheet shows following items:

Wages: John Gawalko, \$80.00—Z. Gross, \$50.00—
L. Sinclair, \$45.00—M. Jarman, \$25.00—B. W.
Burke, \$87.50—D. Sinclair, \$62.50—Chas.
Tuckett, \$125.00.

Film Rental: Tiffany Stahl 50%, \$72.78—Fox
Film 50%, \$454.50—Vitaphone Corpn. 50%,
\$100.00—Paramount Film 50%, \$1,045.81—
Pathe Film 50%, \$152.04—Paramount Film
50%, \$500.00—Educational Film 50%. \$45.88.

Film Freight: City Wharf, \$21.87—Jack's Trans-
fer, \$3.50—J. Gross Transfer, \$40.49.

General Expense: None.

Replacements and Repairs: None.

Advertising: Empire Printg., \$17.53—Juno Cold
Storage, \$2.00.

(Testimony of Charles M. Tuckett.)

Lights, Water, Tele.: Juno Water, \$4.00—A. E. L. & P. Co., \$135.00—Juno Tele., \$3.00.	
Heat: Union Oil, \$20.75.	
Insurance & Taxes: 1/12 City Taxes, \$63.00.	
Rental: Rental all 6%, \$252.87.	
Gross Receipts:	\$4,295.50
Totals: Wages, \$475.00	
Film Rental, \$2,371.01	
Film Freight, \$65.86	
Advertising, \$19.53	
Lights, Water, Tele., \$142.00	
Heat, \$20.75	
Insurance & Taxes, \$63.00	
Rental, \$252.87—Total	3,410.02
	<hr/>
Net Profit.....	\$ 885.48
	[423]

Coliseum Theatre—Juneau
 EXPENSE ACCOUNT FOR AUGUST, 1930.

Working sheet shows following items:

- Wages: Duncan Sinclair, \$62.50—Z. Gross, \$50.00
 —L. Sinclair, \$45.00—John Gawalko, \$78.00—
 M. Jarman, \$25.00—Chas. Tuckett, \$125.00.
- Film Rental: Educational Films 50%, \$106.00—
 Fox Films 50%, \$452.38—Pathe Films 50%,
 \$173.15—Vitaphone Corpn. 50%, \$120.95—
 Warner Bros. 50%, \$185.75—Vitaphone Corpn.
 50%, \$266.00.

(Testimony of Charles M. Tuckett.)

Film Freight: Alaska S. S. Co., \$31.75—Jack's
Transfer, \$4.75—J. Gross Transfer, \$16.08.

General Expense: None.

Replacements & Repairs: None.

Advertising: Empire Printing, \$140.60.

Lights, Water, Tele.: A. E. L. & P. Co., \$97.93—
Juneau Water Co., \$4.00—Juneau Telephone,
\$3.00.

Heat: Union Oil, \$20.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$4,458.06

Totals: Wages, \$385.50

Film Rental, \$1,304.23

Film Freight, \$52.58

Advertising, \$140.60

Lights, Water, Tele., \$104.93

Heat, \$20.75

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 2,324.46

Net Profit.....\$2,133.60

[424]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR SEPTEMBER, 1930.

Working sheet shows following items:

Wages: John Gaualko, \$70.00—Duncan Sinclair, \$62.50—B. W. Burke, \$87.50—Z. Gross, \$50.00—Chas. Tuckett, \$125.00—L. Sinclair, \$45.00—June Geyer, \$25.00—Mrs. Davis, \$16.00—Mickey Carney, \$25.00.

Film Rental: Fox Film 50%, \$190.77—Paramount Film 50%, \$507.78—Vitaphone Film 50%, \$311.36.

Film Freight: Jack's Transfer, \$5.00—J. Gross, \$21.92.

General Expense: Geo. Simpkins, \$6.00.

Replacements & Repairs: None.

Advertising: Empire Printg., \$94.95—Juno Cold Storage, \$2.00.

Lights, Water, Tele.: Juno Water, \$4.00—A. E. L. & P. Co., \$75.90—Juno Telephone, \$3.00.

Heat: Union Oil Co., \$20.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$4,955.15

Totals: Wages, \$506.00

Film Rental, \$1,009.91

Film Freight, \$26.92

General Expense, \$6.00

Advertising, \$96.95

Lights, Water, Tele., \$82.90

Heat, \$20.75

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 2,065.30

Net Profit.....\$2,889.85

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR OCTOBER, 1930.

Working sheet shows following items:

Wages: Duncan Sinclair, \$75.00—Z. Gross, \$50.00
—B. W. Burke, \$87.50—J. Gawalko, \$80.00—L.
Sinclair, \$45.00—June Geyer, \$25.00—Chas.
Tuckett, \$125.00.

Film Rental: Paramount Pictures 50%, \$1,277.84
—Pathe Film 50%, \$356.04—Educational Film
50%, \$78.00—Fox Film 50%, \$108.58—Vita-
phone Corpn, \$384.88—Paramount Films 50%,
\$868.92—Educational Films 50%, \$59.75.

Film Freight: City Wharf, \$17.54.

General Expense: None.

Replacements and Repairs: Electrical Products,
\$7.00.

Advertising: Juno Pub. Schools, \$8.50—Empire
Printg. \$66.10.

Lights, Water, Tele.: Juno Telephone, \$3.00—Juno
Water, \$4.00—A. E. L. & P. Co., \$117.20.

Heat: Union Oil, \$40.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$4,861.79

Totals: Wages, \$487.50

Film Rental, \$1,984.01

Film Freight, \$17.54

Replacement & Repairs, \$7.00

Advertising, \$74.60

Lights, Water, Tele., \$124.20

(Testimony of Charles M. Tuckett.)

Heat, \$40.75

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 3,051.47

 Net Profit.....\$1,810.32

[426]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR NOVEMBER, 1930.

Working sheet shows following items:

Wages. Duncan Sinclair, \$75.00—Z. Gross, \$50.00

B. W. Burke, \$87.50—J. Gaualko, \$80.00—L.

Sinclair, \$45.00—Chas. Tuckett, \$125.00.

Film Rental: Fox Film Co. 50%, \$398.15—Pathe
Films, 50%, \$193.33—Paramount Films 50%,
\$708.91.Film Freight: Jack's Transfer, \$6.00—Pacific S.
S. Co., \$15.55—Northland Transp. Co., \$2.10.

General Expense: None.

Replacements & Repairs: Electrical Research
Prod., \$500.00.Advertising: Empire Printg., \$52.05—Western
Poster, \$14.60.Lights, Water, Tele.: Juno Water, \$4.00—Juno
Telephone, \$3.00—A. E. L. & P. Co., \$291.49.

Heat: Union Oil, \$40.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$3,907.90

(Testimony of Charles M. Tuckett.)

Totals: Wages, \$462.50	
Film Rental, \$1,300.39	
Film Freight, \$23.65	
Replacements and repairs, \$500.00	
Advertising, \$66.65	
Lights, Water, Tele., \$298.49	
Heat, \$40.75	
Insurance & Taxes, \$63.00	
Rental, \$252.87—Total	3,002.30
	<hr/>
Net Profit.....	\$ 905.60
	[427]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR DECEMBER, 1930.

Working sheet shows following items:

Wages: Z. Gross, \$50.00—D. Sinclair, \$75.00—B. W. Burke, \$87.50—J. Gauwako, \$85.00—L. Sinclair, \$45.00—Chas. Tuckett, \$125.00—B. W. Burke, \$10.00—D. Sinclair, \$10.00—J. Gawalko, \$10.00—L. Sinclair, \$5.00—Grace, \$5.00—Chas. Tuckett, \$10.00.

Film Rental: Fox Film 50%, \$80.33—Vitaphone Corpn. 50%, \$535.60—Pathe Film Co. 50%, \$55.50—Paramount Publix 50%, \$522.35—Fox Film Co., 50%, \$546.99—Pathe Film 50%, \$208.55.

Film Freight: J. Gross Transfer, \$41.87—City Wharf, \$25.24.

General Expense: Geo. Simpkins, \$8.50—Zellerbach Paper Co., \$54.95.

(Testimony of Charles M. Tuckett.)

Replacements & Repairs: None.

Advertising: Empire, \$71.20.

Lights, Water, Tele.: Juno Water, \$4.00—A. E. L.
& P. Co., \$135.99—Juno Telephone, \$3.00.

Heat: Union Oil Co., \$40.75.

Insurance & Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$252.87.

Gross Receipts:\$5,517.55

Totals: Wages, \$517.50

Film Rental, \$1,949.32

Film Freight, \$67.11

General Expense, \$63.45

Advertising, \$71.20

Lights, Water, Tele., \$142.99

Heat, \$40.75

Insurance & Taxes, \$63.00

Rental, \$252.87—Total 3,168.19

Net Profit.....\$2,349.36

Witness Tuckett testified that defendant's Exhibit K-2 were work sheets and summary of the Coliseum theatre for 1930, and was in all respects similar to the one he had just testified to, prepared in the same manner, covers the same subject, that the allocations in it are made in the same way as to the labor and other things, and contains only those items in the books referring to the Coliseum theatre and omits items which don't refer to the Coliseum theatre, and he read to the jury the first page of that exhibit. [428]

(Testimony of Charles M. Tuckett.)

EXHIBIT No. K-3

PROFIT AND LOSS STATEMENT

1931

COLISEUM THEATRE

Juneau, Alaska

	Total Receipts	Total Expenses	Net Profits	Net Loss
January	\$ 3,347.41	\$ 3,206.23	\$ 141.18	
February	3,078.68	4,498.26		\$ 1,419.58
March	3,059.95	2,902.00	157.95	
April	3,042.83	3,295.86		253.03
May	2,797.23	2,993.10		195.87
June	2,656.35	3,313.47		657.12
July	2,813.72	3,573.50		759.78
August	3,151.50	2,820.22	331.28	
September	2,765.06	3,095.88		330.82
October	2,828.10	1,244.83	1,583.27	
November	2,873.25	3,305.11		431.86
December	2,458.74	3,684.55		1,225.81
	<u>\$34,872.82</u>	<u>\$37,933.01</u>	<u>\$ 2,213.68</u>	<u>\$ 5,273.87</u>
		34,872.82		2,213.68
Proof		<u>3,060.19</u>		<u>3,060.19</u>

Memorandum:

Net Loss for year 1931	\$ 3,060.19
(Plus) Depreciation for year 1931	6,500.00
Net Loss for year 1931	<u>\$ 9,560.19</u>
	(Loss)

[429]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JANUARY, 1931.

Working sheet shows following items:

Wages: Z. Gross, \$50.00—J. Gaualko, \$85.00—L. Sinclair, \$45.00—D. Sinclair, \$75.00—B. W. Burke, \$87.50—Chas. Tuckett, \$125.00—Grace Meggett, \$25.00.

Film Rental: Vitaphone Corp'n 50%, \$122.48—Fox Film 50%, \$283.75—Tiffany Productions 50%, \$19.20—Tiffany Productions 50%, \$209.00—Paramount Publics 50%, \$765.46—Warner Bros. 50%, \$500.00—Pathe Exchange 50%, \$125.38.

Film Frt: O. B. Femmer, \$4.33—Jacks Transfer, \$7.00—J. Gross Transfer, \$26.85.

General Expense: Geo. M. Simpkins, \$2.00—Harrison Reports, \$16.00.

Replacement: Elec. Research Prod., \$10.20.

Adv: Juno Cold Storage, \$6.00—Empire Printing Co., \$95.05—Western Poster Co., \$18.90.

Lights, Water, Tele: A. E. L. & P. Co., \$156.00—Juno Water Co., \$4.00—Telephone, \$3.00.

Heat: Union Oil Co., \$40.75.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental; Rental all 6%, \$235.38.

Gross Receipts:\$3,347.41

Totals: Wages, \$492.50

Film Rental, \$2,025.27

Film Frt., \$38.18

General Expense, \$18.00

(Testimony of Charles M. Tuckett.)

Replacement, \$10.20—Adv., \$119.95

Lights, Water, Tele., \$163.00

Heat., \$40.75—Ins. & Taxes, \$63.00

Rental, \$235.38 —Total 3,206.23

 Net Profit.....\$ 141.18

[430]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR FEBRUARY, 1931.

Working sheet shows following items:

Wages: Z. Gross, \$50.00—L. Sinclair, \$45.00—D. Sinclair, \$75.00—B. W. Burke, \$40.00—J. Gau-alko, \$35.00—Chas. Tuckett, \$125.00—Grace Meggett, \$25.00.

Film Rental: Fox Film 50%, \$426.67—Warner Film 50%, \$500.00—Pathe Film Exchange 50%, \$111.50—Warner Bros. 50%, \$500.00—Educational Film Co. 50%, \$61.45—Paramount Publics 50%, \$695.96—Warner Bros. 50%, \$569.40—Tiffany Stahl Prod. 50%, \$95.78—Universal Films 50%, \$142.67.

Film Frt: J. Gross Transfer, \$21.08—D. B. Femmer, \$11.20—Pacific S. S. Co., \$9.77.

General Expense: Allied Amusements, \$14.90—Seattle Rubber Stamp Co., \$11.80.

Replacement: Capital Electric, \$12.50.

(Testimony of Charles M. Tuckett.)

Adv: Empire Printing Co., \$72.50—Strollers Weekly, \$7.50—Pioneer Printing Co., \$105.00—Fireman's Club, \$10.00—Empire Printing Co., \$207.20.

Lights, Water, Tele: Juno Water Co., \$4.00—A. E. L. & P. Co., \$173.45.

Heat: Union Oil Co., \$40.75.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$3,078.68

Totals: Wages, \$395.00

Film Rental, \$3,103.23

Film Frt., \$42.05

General Expense, \$26.70

Replacement, \$12.50—Adv., \$402.20

Light, Water, Tele., \$177.45

Heat, \$40.75—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 4,498.26

Net Loss.....\$1,419.58

[431]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MARCH, 1931.

Working sheet shows following items:

Wages: Z. Gross, \$50.00—D. Sinclair, \$75.00—B. W. Burke, \$87.50—Lyda Sinclair, \$45.00—G. Cortez, \$62.50—Chas. Tuckett, \$125.00—Grace Meggett, \$25.00.

Film Rental: Fox Films, \$426.19—Paramount Films, \$575.12—Warner Bros., \$513.31—Pathe Exchange, \$236.10—Educational Films, \$61.55.

Film Frt: City Wharf, \$48.46.

General Expense: Anderson Music Co., \$10.00.

Replacement: None.

Adv: None.

Lights, Water, Tele: A. E. L. & P. Co., \$175.94—Juno Tele. Co., \$3.00.

Heat: None.

Ins. & Taxes: Internal Revenue 75%, \$83.95—City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$3,059.95

Totals: Wages, \$470.00

Film Rental, \$1,812.27

Film Frt., \$48.46

General Expense, \$10.00

Replacement, None—Adv., None

Lights, Water, Tele., \$178.94

Heat, None—Ins. & Taxes, \$146.95

Rental, \$235.38—Total 2,902.00

Net Profit.....\$ 157.95

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR APRIL, 1931.

Working sheet shows following items:

Wages: Z. Gross, \$50.00—D. Sinclair, \$75.00—B. W. Burke, \$87.50—L. Sinclair, \$45.00—G. Cortez, \$62.50—Chas. Tuckett, \$125.00—Grace Meggett, \$25.00—E. B. Clayton, \$75.00.

Film Rental: Tiffany Productions 50%, \$70.75—Warner Bros. 50%, \$448.29—Pathe Exchange 50%, \$107.55—Paramount Films 50%, \$686.66—Fox Films 50%, \$437.60.

Film Frt: J. Gross Transfer, \$27.75—O. B. Femmer, \$18.18—Aaa. S. S. Co., \$13.50.

General Expense: None.

Replacement: None.

Adv: Empire Printing Co., \$152.55—Empire Printing Co., \$166.95—Juno Cold Storage, \$6.00—Western Poster, \$13.65—Strollers Weekly, \$22.50.

Lights, Water, Tele: Juno Water Co., \$8.00—A. E. L. & P. Co., \$147.85.

Heat: Union Oil Co., \$40.75.

Ins. & Taxes: Internal Revenue 75%, \$83.95—City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$3,042.83

Totals: Wages, \$545.00

Film Rental, \$1,750.85

Film Frt., \$59.43

General Expense, None	
Replacement, None—Adv., \$361.65	
Lights, Water, Tele., \$155.85	
Heat, \$40.75—Ins. & Taxes, \$146.95	
Rental, \$235.38—Total	\$3,295.86
	<hr/>
Net Loss.....	\$ 253.03
	[433]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MAY, 1931.

Working sheet shows following items:

Wages: Chas. Tuckett, \$125.00—Alvin Rafell, \$10.00—L. Sinclair, \$45.00—D. Sinclair, \$75.00—Z. Gross, \$50.00—Grace Meggett, \$25.00—E. B. Clayton, \$75.00—Viola Maki, \$12.00—Ned Lemmieux, \$42.00.

Film Rental: Fox Films 50%, \$537.11—Educational Films 50%, \$61.55—Tiffany Productions 50%, \$95.25—Pathe Films 50%, \$145.38—Warner Bros. 50%, \$660.85.

Film Frt: J. Gross Transfer, \$12.13—City Wharf, \$16.55—Pacific S. S. Co., \$38.11.

General Expense: Hellenthal & Hellenthal, \$101.50—Hellenthal & Hellenthal, \$21.85—B. M. Behrends, \$8.15—B. M. Behrends Bank, \$4.90.

Replacement: A. M. Geyer, \$45.77—Thomas Hdwe. Co., \$2.20—G. M. Laboratories, \$72.00.

(Testimony of Charles M. Tuckett.)

Adv: Juno Cold Storage, \$2.00—A. E. L. & P. Co. (for broadcasting), \$6.50—Strollers Weekly, \$22.50—Strollers Weekly, \$7.50—Empire Printing Co., \$151.20.

Lights, Water, Tele: A. E. L. & P. Co., \$177.97—Juno Water, \$4.00.

Heat: Union Oil Co., \$40.75.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$2,797.23

Totals: Wages, \$459.00

Film Rental, \$1,500.14

Film Frt., \$66.79

General Expense, \$136.40

Replacement, \$119.97—Adv., \$189.70

Lights, Water, Tele., \$181.97

Heat, \$40.75—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 2,993.10

Net Loss.....\$ 195.87

[434]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JUNE, 1931.

Working sheet shows following items:

Wages: L. Sinclair, \$33.00—E. B. Clayton, \$75.00
—Z. Gross, \$50.00—D. Sinclair, \$75.00—John
Gaualko, \$60.00.

Film Rental: Fox Film 50%, \$400.12—Educational
Films 50 %, \$65.00—Universal Films 50%,
\$146.30—Paramount Films 50%, \$677.97—War-
ner Bros. 50%, \$822.35—Paramount Films
50%, \$117.39—Pathe R. K. O. 50%, \$109.42.

Film Frt: None.

General Expense: None.

Replacement: Thos. Hdwe. Co., \$9.78—G. M. Lab-
oratories, \$72.00.

Adv: Empire Printing Co., \$166.95.

Lights, Water, Tele: A. E. L. & P. Co., \$110.46—
Juno Water, \$4.00.

Heat: Union Oil Co., \$20.35.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$2,656.35

Totals: Wages, \$293.00

Film Rental, \$2,338.55

Film Frt., None

General Expense, None.

Replacement, \$81.78—Adv. \$166.95

Lights, Water, Tele., \$114.46

Heat, \$20.35—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 3,313.47

 Net Loss.....\$ 657.12

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JULY, 1931.

Working sheet shows following items:

Wages: John Gaualko, \$9.00—E. B. Clayton, \$75.00—D. Sinclair, \$75.00—Z. Gross, \$50.00—L. Sinclair, \$49.00.

Film Rental: Fox Film Co. 50%, \$528.34—Paramount 50%, \$642.20—Tiffany Films 50%, \$90.75—Educational Films 50%, \$72.62—Warner Bros. 50%, \$659.00—Tiffany Films 50%, \$54.76—Pathe Films 50%, \$242.95.

Film Frt: City Wharf, \$37.64—Gross Transfer, \$11.50—Gross Transfer, \$25.20—Jack's Transfer, \$6.50—D. B. Femmer, \$4.73.

General Expense: None.

Replacement: Thomas Hdwe., \$9.78—C. C. Farmer, \$100.00.

Adv: Empire Printing Co., \$143.85—Empire Printing Co., \$132.15—Strollers Weekly, \$30.00 Chamber of Commerce, \$25.00—Harrison Reports, \$10.00—Empire Printing Co., \$2.00—Juno Hi School, \$8.50—Juno Cold Storage, \$4.00.

Lights, Water, Tele: A. E. L. & P. Co., \$127.95—Juno Tele. Co., \$3.00—Juno Water, \$4.00.

Heat: Union Oil Co., \$20.35—Union Oil Co., \$20.35.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$2,813.72

Totals: Wages, \$258.00

Film Rental, \$2,290.62

(Testimony of Charles M. Tuckett.)

Film Frt., \$85.57

General Expense, None

Replacement, \$109.78—Adv., \$355.50

Lights, Water, Tele., \$134.95

Heat, \$40.70—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 3,573.50

Net Loss.....\$ 759.78

[436]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR AUGUST, 1931.

Working sheet shows following items:

Wages.: E. B. Clayton, \$75.00—D. Sinclair, \$75.00

—Z. Gross, \$50.00—Lyda Sinclair, \$45.00—C.

Larson, \$20.00—John Gaualko, \$50.00.

Film Rental: Fox Films 50%, \$317.99—Warner Bros., 50%, \$607.32—Paramount Films 50%, \$522.38—Tiffany Pictures 50%, \$91.40—Educational Pictures 50%, \$69.90—Pathe Films 50%, \$257.70.

Film Frt: Pacific S. S. Co., \$13.74—Aaa. S. S. Co., \$7.75.

General Expense: R. E. Robertson, \$5.00.

Replacement: None.

Adv: Empire Printing Co., \$195.30—Juno Cold Storage, \$2.00—Strollers Weekly, \$9.00.

Lights, Water & Tele: A. E. L. & P. Co., \$96.75—Juno Water Co., \$4.00.

Heat: Union Oil Co., \$20.35.

(Testimony of Charles M. Tuckett.)

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$3,151.50

Totals: Wages, \$315.00

Film Rental, \$1,866.69

Film Frt., \$7.75 (Should be, \$21.49)

General Expense, \$5.00

Replacement, None—Adv., \$206.30

Lights, Water, Tele., \$100.75

Heat, \$20.35—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 2,820.22

Net Profit.....\$ 331.28

[437]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR SEPTEMBER, 1931.

Working sheet shows following items:

Wages: C. Larson, \$20.00—L. Sinclair, \$45.00—E. B. Clayton, \$75.00—Z. Gross, \$50.00—J. Gau-alko, \$50.00.

Film Rental: Universal Films 50%, \$138.50—Fox Films 50%, \$502.79—Warner Bros. 50%, \$620.87—Paramount Films 50%, \$644.99—Educational Films 50%, \$75.87—Tiffany Pictures 50%, \$89.60.

Film Frt: Aaa S. S. Co., \$27.64—J. Gross Transfer, \$22.00.

(Testimony of Charles M. Tuckett.)

General Expense: None.

Replacement: First Nat'l Bank (carbons), \$80.00
—National Theatre, \$73.87.

Adv: Strollers Weekly, \$6.00—Empire Printing,
\$143.90.

Lights, Water, Tele: A. E. L. & P. Co., \$100.12—
Juno Tele. Co., \$3.00—Juno Water Co., \$4.00—
Juno Water Co., \$4.00.

Heat: Union Oil Co., \$20.35.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$2,765.06

Totals: Wages, \$240.00

Film Rental, \$2,072.62

Film Frt., \$49.64

General Expense, None

Replacement, \$153.87—Adv., \$149.90

Lights, Water & Tele., \$111.12

Heat, \$20.35—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 3,095.88

Net Loss.....\$ 330.82

[438]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR OCTOBER, 1931.

Working sheet shows following items:

Wages: John Gaualko, \$50.00—E. B. Clayton,
\$75.00—Z. Gross, \$50.00—Bess Millard, \$20.00
—L. Sinclair, \$45.00.

Film Rental: Fox Films 50%, \$387.25.

Film Frt: Northland Transportation, \$6.80.

General Expense: None.

Replacement: Universal Sound Equipment, \$39.10.

Adv: Empire Printing, \$117.40—Strollers Weekly,
\$6.00—Western Poster, \$2.70.

Lights, Water, Tele: Juno Tele. Co., \$3.00—A. E.
L. & P. Co., \$114.85—Juno Water Co., \$4.00.

Heat: Union Oil Co., \$20.35.

Ins. & Taxes: City Clerk's Office, \$5.00—City
Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipt:\$2,828.10

Totals: Wages, \$240.00

Film Rental, \$387.25

Film Frt., \$6.80

General Expense, None

Replacement, \$39.10—Adv., \$126.10

Lights, Water, Tele., \$121.85

Heat, \$20.35—Ins. & Taxes, \$68.00

Rental, \$235.38—Total 1,244.83

Net Profit.....\$1,583.27

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR NOVEMBER, 1931.

Working sheet shows following items:

Wages: E. B. Clayton, \$75.00—J. Gaualko, \$50.00
 —Chas. Whyte, \$25.00—Bess Millard, \$20.00—
 L. Sinclair, \$45.00—Z. Gross, \$50.00.

Film Rental: Pathe Film 50%, \$170.40—Warner
 Bros. 50%, \$562.40—Pathe Film 50%, \$179.50
 —Tiffany Film 50%, \$159.65—Fox Film 50%,
 \$548.49—Paramount Pictures 50%, \$567.71—
 Paramount Pictures 50%, \$185.13.

Film Frt: None.

General Expense: Anderson Music Shop, \$5.00—
 U. S. Post Office (Envelopes), \$46.00—Clerk
 of Court, \$10.00.

Replacement: None.

Adv: Empire Printing Co., \$137.60—Strollers
 Weekly, \$22.00.

Lights, Water, Tele: Juno Water Co., \$4.00—
 Juno Tele. Co., \$3.00—City Light & Power,
 \$100.10.

Heat: Union Oil Co., \$40.75.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$2,873.25

Totals: Wages, \$265.00

Film Rental, \$2,373.28

Film Frt., None

General Expense, \$61.00

Replacement, None—Adv. \$159.60

Lights, Water, Tele., \$107.10

Heat, \$40.75—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 3,305.11

Net Loss.....\$ 431.86

[440]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR DECEMBER, 1931.

Working sheet shows following items:

Wages: Z. Gross, \$50.00—D. Sinclair, \$75.00—J.

Gaualko, \$50.00—E. B. Clayton, \$75.00—Bess

Millard, \$20.00—L. Sinclair, \$45.00—Chas.

Whyte, \$25.00—Rex Parrott, \$33.00.

Film Rental: Educational Films 50%, \$148.60—

Warner Bros., 50%, \$559.47—Pathe Exchange

50%, \$307.62—Paramount Exchange 50%,

\$555.20—B. M. Behrends Bank 50%, \$10.63—

Fox Film 50%, \$974.24.

Film Frt: Gross Transfer, \$16.10—Pacific S. S.

Co., \$23.83.

General Expense: None.

Replacement: None.

Adv: Empire Printing Co., \$95.90—Hurley En-

graving Co., \$59.58—Strollers Weekly, \$34.00.

Lights, Water, Tele: Juno Tele. Co., \$3.00—A. E.

L. & P. Co., \$180.25—Juneau Water Co., \$4.00.

Heat: Union Oil Co., \$40.75.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$235.38.

Gross Receipts:\$2,458.74

Totals: Wages, \$373.00

Film Rental, \$2,555.76

Film Frt., \$39.93

General Expense, None

Replacement, None—Adv. \$189.48

Lights, Water, Tele., \$187.25

Heat. \$40.75—Ins. & Taxes, \$63.00

Rental, \$235.38—Total 3,684.55

Net Loss

\$1,225 81

(Testimony of Charles M. Tuckett.)

Witness Tuckett testified that defendant's Exhibit K-3 were work sheet and summaries for the Juneau Coliseum theatre for 1931, and in all respects similar to and prepared in the same manner and showing the same things as the one he had just testified to; that the expenses and income shown on the work sheet were arrived at in the same manner, depreciation taken the same way, capital investment calculated the same way, also carried as rent, and that he used that work throughout for that purpose, and he read the first page thereof to the jury, and that by sum total of monthly profit he meant the sum total of whatever monthly profits had been made in [441] that year and that net loss is the sum total of the monthly losses, that he subtracts the loss from the profit or the profit from the loss to find out which is greater; that he subtracted the total of the monthly profits from the total of the monthly losses which gave \$3,060.19, through loss before depreciation and \$9,560.19 net loss for that year after depreciation; that he depreciated the property 5% on buildings and that sort of thing; and 10% on machinery and furnishings; that the average life of equipment is ten years which is the reason he took 1/10th each year; that the average life of the other property is 20 years; that he took 5% throughout as the whole basis of his calculation for depreciation.

[442]

(Testimony of Charles M. Tuckett.)

EXHIBIT No. K-4

PROFIT AND LOSS STATEMENT

1932

COLISEUM THEATRE

Juneau, Alaska

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	\$ 2,257.17	\$ 2,797.16		\$ 539.99
February	2,468.16	3,112.69		644.53
March	2,075.55	2,780.51		704.96
April	2,228.26	1,913.53	\$ 314.73	
May	2,119.23	1,911.01	208.22	
June	2,337.95	713.94	1,624.01	
July	1,984.28	1,176.30	807.98	
August	2,431.46	2,395.35	36.11	
September	2,044.95	2,958.06		913.11
October	2,857.10	2,131.65	725.45	
November	2,244.60	2,317.42		72.82
December	2,330.75	1,608.44	722.31	
	<u>\$27,379.46</u>	<u>\$25,816.06</u>	<u>\$ 4,438.81</u>	<u>\$ 2,875.41</u>
	25,816.06		2,875.41	
Proof	\$ 1,563.40		\$ 1,563.40	

Memorandum:

Depreciation taken for year 1932	\$ 6,700.00
Net Profit for year 1932	1,563.40
	<hr/>
Net Loss for year 1932	\$ 5,136.60
	(Loss)
	<hr/>

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JAN. 1932.

Working sheet shows following items:

Wages: Rex Parrott, \$16.50—D. Sinclair, \$75.00—
Chas. Whyte, \$25.00—Bess Millard, \$20.00—L.
Sinclair, \$45.00—J. Gross, \$50.00—J. Gaualko,
\$50.00.

Film Rental: Paramount Films 50%, \$167.24—
RKO Pathe 50%, \$118.75—Paramount Films
50%, \$548.07—Fox Films 50%, \$417.68—War-
ner Bros. Films 50%, \$507.90.

Film Freight: Dave Flemmer, \$12.18—Gross
Transfer, \$20.42—Gross Transfer, \$18.20.

General Expense: Hayes Shop, \$5.00—John Dunn
(Court), \$8.10—Hansons Reports, \$12.00.

Replacement, Repairs: None.

Adv: Empire Printg. Co., \$84.70—First Nat. Bank
(dishes), \$55.64—Kanns Store (aprons) \$45.00.

Light. Water, Tele: A. E. L. & P. Co., \$182.20—
Juno Tele., \$3.00—Juno Water, \$4.00.

Heat: Union Oil, \$20.35—Standard Oil, \$20.35.

Insurance, Taxes: 1/12 city taxes, \$63.00.

Misc: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2257.17

Totals: Wages, \$281.50

Film Rental, \$1759.64

Film Freight, \$50.81

General Expenses, \$25.10

Replacement, Repairs, None

(Testimony of Charles M. Tuckett.)

Adv.,	\$185.34
Light, Water, Tele.,	\$189.20
Heat, \$40.70—Insurance, Taxes,	\$63.00
Misc., None—Rental,	\$201.87
Total	2797.16

Net Loss.....	\$ 539.99
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[444]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR FEB. 1932.

Working sheet shows following items:

Wages: D. Sinclair, \$75.00—J. Gaualko, \$50.00—
 J. Gross, \$50.00—Chas. Whyte, \$25.00—Bess
 Millard, \$20.00—L. Sinclair, \$45.00—Rex Par-
 rott, \$20.00—Bess Millard, \$10.00—B. F. Moe,
 \$100.00.

Film Rental: Universal Film 50%, \$171.95—Cos-
 mopolitan Film 50%, \$100.00—Educational
 Film 50%, \$80.00—Paramount Film 50%,
 \$506.56—Fox Film 50%, \$510.13—Warner
 Bros. Film 50%, \$568.32.

Film Freight: None.

General Expense: Jack Burford, \$20.00.

Replacement, Repairs: None.

Adv: First Nat. Bank (dishes), \$40.54—First Nat.
 Bank (dishes) \$95.05—Empire Printg., \$89.60
 —Strollers Weekly, \$16.90—Queen Anne Candy,
 \$21.00.

(Testimony of Charles M. Tuckett.)

Light, Water, Tele: A. E. L. & P. Co., \$184.85—

Juno Tele., \$3.00—Juneau Water, \$4.00.

Heat: Union Oil, \$20.35—Standard Oil, \$20.35.

Insurance, Taxes: 1/12 City Taxes, \$63.00

Miscel: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2468.16

Totals: Wages, \$395.00

Film Rental, \$1937.18

Film Freight, None

General Expense, \$20.00

Replacement, Repairs, None

Adv., \$263.09

Light, Water, Tele., \$191.85

Heat, \$40.70—Insurance, Taxes, \$63.00

Miscel., None

Rental, \$201.87—Total 3112.69

 Net Loss.....\$ 644.53

[445]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MARCH, 1932.

Working sheet shows following items:

Wages: D. Sinclair, \$75.00—L. Sinclair, \$45.00—
J. Gaualko, \$45.00—J. Gross, \$45.00—Chas.
Whyte, \$25.00—Rex Parrott, \$20.00—Bess
Millard, \$10.00.

Film Rental: Fox Films 50%, \$259.59—Para-
mount 50%, \$512.67—Warner Bros., \$635.95—
Educational Films 50%, \$150.20—Pathe Films
50%, \$176.25—Educational Films 50%, \$26.25.

Film Freight: Pac. S. S. Co., \$8.00—City Wharf,
\$29.45—Pac. S. S. Co., \$12.82.

General Expense: None.

Replacement, Repairs: Thomas Hdwe., \$4.61.

Adv: Empire Printg. Co., \$105.75—Kanns Store
(aprons), \$76.80.

Light, Water, Tele: A. E. L. & P. Co., \$164.60—
Juno Tele., \$3.00—Juno Water, \$4.00.

Heat: Standard Oil, \$40.35—Union Oil, \$40.35.

Taxes: 1/12 City Taxes.

Miscel: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2075.55

Totals: Wages, \$265.00

Film Rental, \$1760.91

Film Freight, \$50.27

General Expense, None

Replacement, Repairs, \$4.61

Adv., \$182.55

(Testimony of Charles M. Tuckett.)

Light, Water, Tele., \$171.60

Heat, \$80.70—Insurance, Taxes, \$63.00

Miscel., None

Rental, \$201.87—Total 2780.51

 Net Loss.....\$ 704.96

[446]

Coliseum Theatre—Juneau
EXPENSE ACCOUNT FOR APRIL, 1932.

Working sheet shows following items:

Wages: Duncan Sinclair, \$75.00—L. Sinclair, \$45.00—J. Gaualko, \$50.00—Chas. Whyte, \$50.00—Edna Riendeau, \$12.00.

Film Rental: Paramount Pictures 50%, \$517.12—
Fox Film, \$360.10.

Film Freight: Aaa. S. S. Co., \$7.00—J. Gross
Transfer, \$26.90—City Dock, \$3.15.

General Expense: Hellenthall & Hellenthall, \$11.20
—First Nat. Bank (paper), \$27.50—U. S. Post
office (envelopes), \$12.52.

Replacement, Repairs: B. F. Shearer Co., \$18.09.

Adv: Empire Printg., \$7.70—Strollers Weekly,
\$47.30—Queen Anne Candy, \$21.00—Motion
Picture Herald, \$2.50—First Nat. Bank
(dishes), \$27.53—Queen Anne Candy, \$21.00—
Dohrman Hotel Supply (dishes), \$22.10.

Lights, Water, Tele: A. E. L. & P. Co., \$196.25—
Juno Tele., \$3.00—Juno Water, \$4.00.

(Testimony of Charles M. Tuckett.)

Heat: Standard Oil, \$40.35—Union Oil, \$40.35.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Miscel: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2228.26

Totals: Wages, \$232.00

Film Rental, \$877.22

Film Freight, \$37.05

General Expense, \$51.22

Replacement, Repairs, \$18.09

Adv., \$149.13

Light, Water, Tele., \$203.25

Heat, \$80.70—Insurance, Taxes, \$63.00

Miscel., None.

Rental, \$201.87—Total 1913.53

Net Profit.....\$ 314.73

[447]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MAY, 1932.

Working sheet shows following items:

Wages: O. Sinclair, \$75.00—L. Sinclair, \$45.00—

J. Gaualko, \$50.00—Chas. Whyte, \$25.00—Edna

Riendeau, \$20.00.

Film Rental: Warner Bros., 50%, \$256.52—Para-

mount 50%, \$541.67—Fox Film, \$359.59.

Film Freight: City Wharf, \$26.54.

General Expense: None.

(Testimony of Charles M. Tuckett.)

Replacement, Repairs: None.

Adv: Piggly Wiggly (cigarettes), \$25.22—Queen
Anne Candy, \$21.00—Strollers Weekly, \$30.00.

Light, Water, Tele: A. E. L. & P. Co., \$143.25—
Juno Water, \$4.00—Juno Tele., \$3.00.

Heat: Standard Oil, \$20.35.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Miscel: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2119.23

Totals: Wages, \$215.00

Film Rental, \$1157.78

Film Freight, \$26.54

General Expense, None

Replacement, Repairs, None

Adv., \$76.22

Lite, Water, Tele., \$150.25

Heat, \$20.35

Insurance, Taxes, \$63.00

Miscel., None

Rental, \$201.87—Total 1911.01

Net Profit.....\$ 208.22

[448]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JUNE, 1932.

Working sheet shows following items:

Wages: L. Sinclair, \$45.00—Edna Riendeau, \$20.00
—D. Sinclair, \$75.00—J. Gaualko, \$50.00—
Chas. Whyte, \$50.00.

Film Rental: None.

Film Freight: None.

General Expense: None.

Replacement, Repairs: Thos. Hdwe., \$9.50.

Adv: Strollers Weekly, \$6.00—Juno Chamber Com-
merce, \$10.00—Juno Florists, \$6.72—Empire
Printg. Co., \$42.00.

Light, Water, Tele: Juno Water, \$4.00—A. E. L.
& P. Co., \$107.50—Juno Telephone, \$3.00.

Heat: Union Oil, \$20.35.

Insurance, Taxes: 1/12 City Taxes.

Misc: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2337.95

Totals: Wages, \$240.00

Film Rental, None

Film Freight, None

General Expense, None

Replacement, Repairs, \$9.50

Adv., \$64.72

Light, Water, Tele., \$114.50

Heat, \$20.35

Insurance, Taxes. \$63.00

Misc., None

Rental, \$201.87—Total 713.94

Net Profit.....\$1624.01

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JULY, 1932.

Working sheet shows following items:

Wages: Edna Riendeau, \$20.00—L. Sinclair, \$45.00—D. Sinclair, \$75.00—J. Gaualko, \$36.63—Chas. Whyte, \$25.00.

Film Rental: U. S. Signal Corps, (wire-Mining Merchants Bank 50%) \$182.87—Educational Pictures 50%, \$164.19—Fox Films 50%, \$10.33.

Film Freight: City Wharf. \$34.22—Northland Transp. Co., \$3.81—J. Gross Transfer, \$22.11.

General Expense: None.

Replacement, Repairs: Thomas Hdwe., \$12.10—Henry Pigg. \$30.00—International Laboratory, \$3.00.

Adv: Empire, \$66.15—Queen Anne Candy. \$21.00—Film Roll Press, \$11.25.

Lights, Water, Tele: A. E. L. & P. Co., \$116.57—Juno Water, \$4.00—Juno Telephone, \$3.00.

Heat: Standard Oil. \$25.20.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Miscel: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$1984.28

Totals: Wages, \$201.63

Film Rental, \$357.39

Film Freight, \$60.14

General Expense, None

Replacement, Repairs, \$41.10

(Testimony of Charles M. Tuckett.)

Adv., \$98.40

Light, Water, Tele., \$123.57

Heat, \$25.20—Taxes, Insurance, \$63.00

Miscel., None

Rental, \$201.87—Total 1176.30

Net Profit.....\$ 807.98

[450]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR AUG. 1932.

Working sheet shows following items:

Wages: L. Sinclair, \$45.00—Jas. Grigsby, \$20.00—

D. Sinclair, \$62.50—Chas. Tuckett, \$75.00.

Film Rental: Educational Films 50%, \$216.17—

Fox Films 50%, \$316.45—Educational Films

50%, \$117.47—Educational Films 50%, \$98.15

—R. K. O. Distributors 50%, \$200.42—R. K. O.

Dist., 50%, \$134.45—Educational Films 50%,

\$175.83—Fox Films 50%, \$316.45—Fox Films

50%, \$41.65.

Film Freight: None.

General Expense: Allied Amusements, \$14.95.

Replacement, Repairs: None.

Adv: Alaska Empire, \$97.45—Strollers Weekly,

\$6.00—Queen Anne Candy, \$21.00.

Water, Light, Tele: A. E. L. & P. Co., \$136.69—

Juno Water, \$4.00—Juno Tele., \$3.00.

(Testimony of Charles M. Tuckett.)

Heat: Standard Oil, \$27.85.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Misc: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2431.46

Totals: Wages, \$202.50

Film Rental, \$1617.04

Film Freight, None

General Expense, \$14.95

Replacement, Repairs, None

Adv., \$124.45

Light, Water, Tele., \$143.69

Heat, \$27.85—Insurance, Taxes, \$63.00

Misc., None

Rental, \$201.87—Total 2395.35

Net Profit.....\$ 36.11

[451]

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR SEPT. 1932.

Working sheet shows following items:

Wages: Chas. Tuckett, \$75.00—O. Sinclair, \$62.50
—L. Sinclair, \$45.00—J. Gawalko, \$50.00—Jane
Grigsby, \$20.00.

Film Rental: Fox Films 50%, \$359.90—Vitagraph
50%, \$472.01—Educational Films 50%, \$153.64
—Vitagraph Inc. 50%, \$383.72—Paramount
Publix 50%, \$335.69—Universal Film 50%,
\$53.42—Fox Film 50%, \$348.69—Fox Film 50%,
\$41.43.

(Testimony of Charles M. Tuckett.)

Film Freight: City Wharf, \$22.99—Aaa. S. S. Co., \$7.00.

General Expense: None.

Replacement, Repairs: None.

Adv: Strollers Weekly, \$6.50—Empire, \$96.95—Queen Anne Candy, \$21.00.

Light, Water, Tele: A. E. L. & P. Co., \$110.35—Juno Tele., \$3.00—Juno Water, \$4.00.

Heat: Standard Oil, \$20.40.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Miscel: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2044.95

Totals: Wages, \$252.50

Film Rental, \$2148.50

Film Freight, \$29.99

General Expense, None

Replacement, Repairs, None

Adv., \$124.45

Light, Water, Tele., \$117.35

Heat, \$20.40—Insurance, Taxes, \$63.00

Miscel., None

Rent, \$201.87—Total 2958.06

Net Loss.....\$ 913.11

[452]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR OCT. 1932.

Working sheet shows following items:

Wages: L. Sinclair, \$45.00—G. Cortez, \$25.00—O. Sinclair, \$62.50—Jane Grigsby, \$20.00—Chas. Tuckett, \$75.00—Jane Grigsby, \$10.00.

Film Rental: Educational Films 50%, \$173.89—Fox Film 50%, \$324.85—Paramount Publix 50%, \$401.82—Vitaphone Inc., \$388.05.

Film Freight: O. B. Femmer, \$9.58.

General Expense: None.

Replacement, Repairs: National Theatre Supply, \$58.12.

Adv: Strollers Weekly, \$6.50—Alaska Empire, \$74.55.

Lights, Water, Tele: A. E. L. & P. Co., \$134.52—Juno Water, \$4.00—Juno Telephone, \$3.00.

Heat: Union Oil, \$50.40.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Miscel: None.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2857.10

Totals: Wages, \$237.50

Film Rental, \$1288.61

Film Freight, \$9.58

General Expense, None

Replacement, Repairs, \$58.12

Adv., \$81.05

Light, Water, Tele., \$141.52

Heat, \$50.40—Insurance, Taxes, \$63.00

Miscel., None.

Rental, \$201.87—Total 2131.65

Net Gain.....\$ 725.45

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT, NOV. 1932.

Working sheet shows following items:

Wages: L. Sinclair, \$45.00—Geo. Cortez, \$25.00—
Dorothy Tuckett, \$12.50—Chas. Tuckett, \$75.00
—D. Sinclair.

Film Rental: J. J. McMeekin, \$75.00—Educational
Films 50%, \$167.80—Universal Films 50%,
\$45.00—Warner Bros. Films 50%, \$385.72—
Fox Film 50%, \$354.59—Paramount Publix
Films 50%, \$553.05.

Film Freight: None.

General Expense: None.

Replacement, Repairs: Moder Repair, \$30.00.

Adv: Juneau Empire, \$70.00.

Lights, Water, Tele: Juno Water, \$4.00—A. E. L.
& P. Co., \$119.19—Juno Telephone, \$3.00.

Heat: Standard Oil, \$25.20.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2244.60

Totals: Wages, \$220.00

Film Rental, \$1581.16

Film Freight, None

General Expense, None

Replacement, Repairs, \$30.00

Adv., \$70.00

Lights, Water, Tele., \$126.19

Heat, \$25.20—Insurance, Taxes, \$63.00

Rental, \$201.87—Total 2317.42

Net Loss.....\$ 72.82

[454]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR DEC. 1932.

Working sheet shows following items:

Wages: O. Sinclair, \$62.50—L. Sinclair, \$45.00—
 Geo. Cortez, \$25.00—O. Tuckett, \$25.00—Chas.
 Tuckett, \$75.00.

Film Rental: R. K. O. Dist. 50%, \$121.15—Warner
 Bros. 50%, \$400.82—Fox Film 50%, \$277.30.

Film Freight: Gross Transfer, \$27.00.

General Expense: None.

Replacement, Repairs: Henry Pigg, \$15.00.

Adv: Strollers Weekly, \$7.13—Empire Printg. Co.,
 \$61.50.

Lights, Water, Tele: Juno Water, \$4.00—A. E. L.
 & P. Co., \$168.97—Juno Tele. Co., \$3.00.

Heat: Standard Oil, \$25.20.

Insurance, Taxes: 1/12 City Taxes, \$63.00.

Rental: Rental all 6%, \$201.87.

Gross Receipts:\$2330.75

Totals: Wages, \$232.50

Film Rental, \$799.27

Film Freight, \$27.00

General Expense, None.

Replacement, Repairs, \$15.00

Adv., \$68.63

Light, Water, Tele., \$175.97

Heat, \$25.20—Insurance, Taxes, \$63.00

Rental, \$201.87—Total 1608.44

Net Profit.....\$ 722.31

(Testimony of Charles M. Tuckett.)

Witness Tuckett testified defendant's Exhibit K-4 was made up in the same manner, profits and losses figured the same way and on the same data and everything else shown on the work sheets or summary, exactly as in Exhibits K-1, 2 and 3. He read to the jury the first page of Exhibit K-4 and further testified that the net profit before depreciation was \$1,563.00 and that he took \$6700.00 depreciation, leaving a loss of \$5,136.60. [455]

EXHIBIT No. K-5

PROFIT AND LOSS STATEMENT

1933

COLISEUM THEATRE

Juneau, Alaska

	Total Receipts	Total Expenses	Net Profits	Net Loss
January	\$ 2,035.70	\$ 1,517.33	\$ 518.37	
February	2,071.55	1,681.20	390.35	
March	1,832.50	1,291.16	541.34	
April	1,759.69	1,546.22	213.47	
	\$ 7,699.44	\$ 6,035.91	\$ 1,663.53	
Proof	6,035.91			
	\$ 1,663.53			

Memorandum :

Depreciation for (4) Months in 1933\$ 2,266.64
 Net Profit for year 1933 (4 months) 1,663.53

Net Loss for 4 Months of 1933\$ 603.11
 (Loss)

House turned over to B. F. Shearer on May 1st, 1933.

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR JANUARY, 1933.

Working sheet shows following items:

Wages: Geo. Cortez, \$25.00—L. Sinclair, \$45.00—
 Mrs. Tuckett \$25.00—D. Sinclair, \$62.50—
 Chas. Tuckett, \$75.00—Chas. Whyte, \$16.70—
 D. J. Sinclair, \$8.00.

Film Rental: RKO Distribution 50%, \$63.75—
 Sheffield Exchange 50%, \$50.00—Paramount
 Exchange 50%, \$564.59.

Film Frt: O. B. Femmer, \$9.91—City Wharf,
 \$6.74.

General Expense: Harrison Reports, \$16.50—
 American Express, \$2.60.

Replacement: H. Pigg, \$20.00.

Adv: Empire, \$79.40—A. Empire, \$1.80.

Lights, Water, Tele: Juno Water, \$4.00—A. E. L.
 & P. Co., \$181.76—Juno Tele., \$3.00.

Heat: Union Oil, \$25.20.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$167.88.

Gross Receipts:\$2,035.70

Totals: Wages, \$257.20

Film Rental, \$678.34

Film Frt., \$16.65

General Expense, \$19.10

Replacement, \$20.00—Adv., \$81.20

Lights, Water, Tele., \$188.76

Heat, \$25.20—Ins. & Taxes, \$63.00

Rental, \$167.88—Total 1,517.33

Net Profit.....\$ 518.37

[457]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR FEBRUARY, 1933.

Working sheet shows following items:

Wages: Geo. Cortez, \$25.00—D. Sinclair, \$62.50—
L. Sinclair, \$45.00—Mrs. Tuckett, \$25.00—
Chas. Tuckett, \$75.00.

Film Rental: Educational Films 50%, \$40.00—
RKO Dist. 50%, \$103.47—Fox Films 50%,
\$286.82—Warner Films 50%, \$411.52—U. S.
Slides 50%, \$2.50.

Film Frt: D. B. Femmer, \$6.50.

General Expense: Seattle Rubber Stamp, \$1.00.

Replacement: Thomas Hdwe., \$6.29—B. F.
Shearer Co., \$96.56.

Adv: Daily Empire, \$53.35—Strollers Weekly,
\$5.00.

Lights, Water, Tele: Juno Water, \$4.00—A. E. L.
& P. Co., \$172.61—Juno Tele., \$3.00.

Heat: Standard Oil, \$25.20.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$167.88.

Gross Receipts:\$2,071.55

Totals: Wages, \$232.50

Film Rental, \$844.31

Film Frt, \$6.50

General Expense, \$1.00

Replacement, \$102.85

Adv., \$58.35

Lights, Water, Tele., \$179.61

Heat, \$25.20—Ins. & Taxes, \$63.00

Rental, \$167.88—Total 1,681.20

Net Profit.....\$ 390.35

[458]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR MARCH, 1933.

Working sheet shows following items:

Wages: L. Sinclair, \$45.00—D. Sinclair, \$62.50—
 Geo. Cortez, \$25.00—Chas. Tuckett, \$75.00—
 Mrs. Tuckett, \$25.00.

Film Rental: Paramount Publix 50%, \$545.41.

Film Frt: J. Gross Transfer, \$13.50.

General Expense: None.

Replacement: Thomas Hdwe. Co., \$8.32.

Adv: Empire, \$82.70.

Lights, Water, Tele: Juno Water, \$4.00—A. E. L.
 & P. Co., \$145.65—Juno Telephone, \$3.00.

Heat: Standard Oil, \$25.20.

Ins. & Taxes: City Taxes 1/12, \$63.00.

Rental: Rental all 6%, \$167.88.

Gross Receipts:\$1,832.50

Totals: Wages, \$232.50

Film Rental, \$545.41

Film Frt., \$13.50

General Expense, None

Replacement, \$8.32

Adv., \$82.70.

Light, Water, Tele., \$152.65

Heat, \$25.20—Ins. & Taxes, \$63.00

Rental, \$167.88—Total 1,291.16

 Net Profit.....\$ 541.34

[459]

(Testimony of Charles M. Tuckett.)

Coliseum Theatre—Juneau

EXPENSE ACCOUNT FOR APRIL, 1933.

Working sheet shows following items:

Wages. L. Sinclair, \$45.00—D. Sinclair, \$62.50—
Chas. Tuckett, \$75.00—Geo. Whyte, \$20.00—
Geo. Cortez, \$25.00.

Film Rental: RKO Films 50%, \$12.50—Fox Films
50%, \$186.84—RKO Pathe 50%, \$99.25—War-
ner Bros. 50%, \$426.97—Sheffield Exchange
50%, \$50.00.

Film Frt: City Wharf, \$10.83.

General Expense: None.

Replacement: Smith Electric Co., \$9.60.

Adv: Empire Printing Co., \$44.74—Queen Anne
Candy, \$63.00.

Lights, Water, Tele: Juno Water, \$4.00—A. E. L.
& P. Co., \$141.91—Juno Tele. Co., \$3.00.

Heat: Union Oil Co., \$25.20.

Ins. & Taxes: Terr. Treasurer, \$10.00—City Taxes
1/12, \$63.00.

Rental: Rental all 6%, \$167.88.

Gross Receipts:\$1,759.69

Totals: Wages, \$227.50

Film Rental, \$775.56

Film Frt., \$10.83

General Expense, None

Replacement, \$9.60

Adv., \$107.74

Lights, Water, Tele., \$148.91

Heat, \$25.20—Ins. & Taxes, \$73.00

Rental, \$167.88—Total 1,546.22

Net Profit.....\$ 213.47

(Testimony of Charles M. Tuckett.)

Witness Tuckett testified that defendant's Exhibit K-5 was the work sheet and summary of the Juneau Coliseum theatre for the first four months of 1933, and were prepared in the same manner and show the same thing as the previous exhibits relating to these matters were prepared, and was calculated on the same basis and from the same books and in the same manner. Witness Tuckett read the first page of Exhibit K-5 to the jury and stated it showed \$1,633.53 profit before depreciation and \$603.11 loss after depreciation. [460]

Whereupon Witness Tuckett further testified: The capital investment in the Juneau theatre was \$90,000.00 so appraised in 1929 the same as at Ketchikan by Clausen and myself, which was the actual value placed on all assets, sound equipment and everything in that theatre in 1929 and 6% interest was charged as interest on the capital investment in calculating the Juneau profits; these documents, exhibits K-1 to K-5, both inclusive, were made from defendant's check books, defendant's exhibits H-2, H-3 and H-5; the items constituting receipts shown on the exhibits K-1 to K-5, both inclusive were taken from the deposits and the daily statements and represent all the receipts during that period; the items of expense were taken from the check book; in calculating the expenses I allocated 50% of the cost of films to Juneau; in arriving at our film expense I took 50% of the total cost of the films; those films were used in Ketchikan and sev-

(Testimony of Charles M. Tuckett.)

eral small theatres; 25% went to the small theatres, 25% to the Ketchikan theatre; I divided the monthly wages in half as employees worked only four hours in the theatre and they had other business to do in taking care of defendant's apartment building and house, in fact they worked at the theatre half the time so the salary was only worth half for the theatre and half for other expenses and I charged it that way; my salary as Manager—the fact that I was doing all the other work, taking care of the books, supervising the work of the extra men and other departments and the different properties defendant had, watching out for shipments of film, etc., the majority of my work wasn't in the theatre, half my work was in the theatre, and the other half was attending to his other business so I charged only half my salary to the theatre; I took a monthly average of the light bill as it also included defendant's home and hall lights of the theatre and of the Gross apartments, and I deducted \$14.00 a month and charged the rest as expense to the theatre; the oil bill is paid under one check for the whole thing the same as the light and my books showed just that one check, but oil was used up to [461] defendant's house and also at Gross Apartments and we divided it either one load of oil or two loads a month; I know I took off one load each month and two some months as not having been used in the Coliseum theatre and deducted the price of those loads from the oil bill; I carried 6% on the

(Testimony of Charles M. Tuckett.)

capital investment as rent; those are the only items; all the other items were taken from my books as actually expended for the Coliseum Theatre; they are correct; the allocation is fair; the work sheets show all the receipts and expenses, and the result in profit and loss; these statements (defendant's Exhibits series I and K, also J and L) are all made on the same basis; the items of expense are taken from the books (defendant's Exhibits series H) in evidence; I know of my personal knowledge what items belong to the Juneau Coliseum Theatre, and only those items were used, and that goes for all these statements (defendant's Exhibits series I and K, also J and L); they contain only items in the books referring to the Coliseum Theatre; this property was depreciated by taking 5% on buildings and things of that sort and 10% [462] on the machinery and furnishings; that depreciation was taken throughout; after the equipment was replenished from defendant's Juneau Theatre, salaries were reduced \$50.00, then \$25.00 until they were down to the present rate, for manager from \$250.00 to \$150.00, and in like proportion for other employees.

Whereupon the following proceedings were had:

“Q. Did you make any other retrenchment in the matter of expenses during that period?

Mr. ROBERTSON: Object to all this line of testimony as incompetent, irrelevant and immaterial; it doesn't go to the true measure of damages.

(Testimony of Charles M. Tuckett.)

The COURT: Objection overruled.

Mr. ROBERTSON: Exception; and I would like to have the same objection go to all this line of testimony instead of objecting to each question propounded to the Witness Tuckett.

The COURT: Very well.

(Last question read)

A. Yes, we started to cut salaries and reducing our overhead such as trying to reduce our film rental, reducing our advertising.

Q. Saved wherever you could?

A. Saved wherever we could on it."

Thereupon Witness Tuckett stated: Defendant's exhibit K-6 for identification is the summary that I made up of the average monthly profit or loss of defendant's Juneau theatre for the years covered by defendant's exhibits K-1 to K-5, both inclusive, and was taken from them.

Thereupon said summary was offered in evidence, to which plaintiff objected on the ground that it was incompetent, irrelevant and immaterial and had no bearing on the true measure of damages, which objection was overruled, to which ruling plaintiff then excepted, whereupon said summary was admitted in evidence and marked

DEFENDANT'S EXHIBIT K-6,

and reads: [463]

(Testimony of Charles M. Tuckett.)

AVERAGE MONTHLY PROFIT AND LOSS STATEMENT.

COLISEUM THEATRE

Juneau, Alaska

Monthly average profit or loss without depreciation	1929	\$1569.48 5/6 profit per month
Monthly average profit or loss with depreciation	1929	\$1094.48 5/6 profit per month
Monthly average profit or loss without depreciation	1930	\$1514.21 7/12 profit per month
Monthly average profit or loss with depreciation	1930	\$ 930.88 1/4 profit per month
Monthly average profit or loss without depreciation	1931	\$ 255.01 7/12 loss per month
Monthly average profit or loss with depreciation	1931	\$ 796.68 1/14 loss per month
Monthly average profit or loss without depreciation	1932	\$ 130.28 1/3 profit per month
Monthly average profit or loss with depreciation	1932	\$ 428.05 loss per month
Monthly average profit or loss without depreciation (4 mths)	1933	\$ 415.88 1/4 profit per month
Monthly average profit or loss with depreciation (4 mths)	1933	\$ 150.77 3/4 loss per month
Monthly average profit or loss May 1, 1929 to (W E installed) May 1, 1931 (\$33,707.22 profit—24 mths) No depreciation		\$1404.46 3/4 profit per month
Monthly average profit or loss same condi- tions and time but with depreciation		\$ 864.15 profit per month
Monthly average profit or loss May 1, 1931 to (W E not installed) May 1, 1933 (\$1540.22 profit—24 mths) No depreciation		\$ 64.17 profit per month
Monthly average profit or loss same condi- tions and time but with depreciation (11759.70 loss)		\$ 489.98 3/4 loss per month

(Testimony of Charles M. Tuckett.)

Thereupon Witness Tuckett, in answer to questions, read to the jury the various items shown on Exhibit K-6 and testified that the average monthly profit without depreciation commencing with the period May 1, 1929, and ending May 1, 1931, when the equipment was in was \$1,420.46 before depreciation and \$854.15 after depreciation; that the average monthly profit during the [464] months following the taking out of the equipment until Shearer took the equipment over was \$64.17 before depreciation and after depreciation loss of \$489.98; that the difference in average monthly profit during the period following the taking out of the equipment and extending from that time until Shearer took over the equipment, from the average monthly profit during the period the equipment was in from May, 1929, to May, 1931, \$1340.29 before depreciation, and \$1354.13 after depreciation—that is the difference between the average monthly loss during the two periods: the difference in profits between the two periods is \$32,165.96, that is the loss during the second period after equipment was taken out and before depreciation; that defendant's Exhibit L are copies of Shearer's Financial report to Gross covering the Juneau Coliseum theatre and show the profits and losses in that theatre since he took it over.

[465]

Thereupon said documents were offered in evidence to which plaintiff objected upon the ground that they were incompetent, irrelevant and immaterial, and not the true measure of damages, which objection was overruled, to which ruling plaintiff then excepted, whereupon said documents were received in evidence marked

(Testimony of Charles M. Tuckett.)

DEFENDANT'S EXHIBIT L,

and read:

JUNEAU EMPIRE THEATRES. INC.

Operating Statement

COLISEUM THEATRE, Juneau, Alaska

May 31, 1933

Receipts		1,131.40
Less Expenses:		
Film Rental	495.00	
Advertising	183.77	
Salaries	237.97	
Heat, Light and Water	62.79	
Rent	200.00	
Bank Charges	2.43	1,181.96

Loss—Coliseum Theatre, Juneau\$ 50.56

Theatre operating part-time, with old-type sound equipment.

June 30, 1933

Receipts		\$ 451.05
Less Expenses:		
Film Rental	\$ 143.50	
Advt. B. P.	39.03	
Advt. Newspaper	56.75	
Advt. Miscel.		
Operator's Salary	66.56	
Miscel. Salaries	62.58	
Heat, Light and Water	39.75	
Rent	200.00	
Proj. Room & House Supplies	12.70	
Freight	1.00	
Insurance	14.00	
Total Expenses		615.69

Loss—Coliseum Theatre, Juneau\$ 164.64

Theatre operating part-time, with old-type sound equipment.

(Testimony of Charles M. Tuckett.)

July 31, 1933

Receipts		\$1,580.25	
Less Expenses:			
Film Rental	683.37		
Advt. B. P.	84.73		
Advt. N. P.	137.00		
Advt. Misc.	6.50		
Manager's Salary	66.67		
Operator's Salary	87.39		
Misc. Salaries	73.92		
Heat, Light and Water	67.64		
Rent	200.00		
Bank Charges	.12		
Proj. Room & House Sup.	40.50		
Freight	1.50		
Insurance	14.00		
Misc. Expense	.75		
Repairs	21.65		
Service on Sound	26.00		
Rental on Sound	15.77	1,527.51	
		<hr/>	
Total Expenses			
Profits—Coliseum Theatre, Juneau		\$	52.74

August, 1933

Box Office Receipts		1,472.85	
Slide Rental		37.50	
		<hr/>	
		\$1,510.35	
Less Expenses:			
Film Rental	793.20		
Advt. Bill Posters	93.17		
Advt. Miscellaneous	41.14		
Advt. Newspapers	89.65		
Salary—Manager	75.00		
Salary—Operator	120.00		
Misc. Salaries	192.49		

(Testimony of Charles M. Tuckett.)

Heat, Light and Water	77.90
Rent	200.00
Tax on Checks	.76
Proj. Room & House Sup.	38.08
Freight	18.52
Insurance	14.60
Rental on Sound Equipment	47.31
Sound Installation Exp.	27.32
Telephone and Telegraph	9.54
Postage	5.00
Bank Charges	4.25
Interest	4.34
Taxes and Licenses	7.50
	<hr/>
Total Expenses	1,859.77

Loss—Coliseum Theatre, Juneau\$ 349.77
[467]

September 30, 1933

Receipts	\$1,793.80
Less Expenses:	
Film Rental	928.75
Advt. Bill Posters	108.13
Advt. Newspapers	96.95
Advt. Miscellaneous	11.85
Salary—Manager	75.00
Salary—Operator	120.00
Miscellaneous—Salaries	219.74
Heat, Light	84.33
Rent	200.00
Tax on Checks	1.02
Proj. Room & House Sup.	24.93
Freight	24.06
Insurance	14.60
Rental on Sound Equipment	63.08
Sound Installation Exp.	130.00

(Testimony of Charles M. Tuckett.)

Telephone and Telegraph	7.39
Office Supplies	1.60
Postage	2.00
Bank Charges	5.10
	<hr/>
Total Expenses	2,118.53

Loss—Coliseum Theatre, Juneau\$ 324.73

October, 1933

Receipts\$1,605.45

Expenses:

Film Rental	1,046.82
Advt. Bill Posters	118.61
Advt. Newspapers	93.90
Advt. Miscellaneous	23.32
Salary—Manager	75.00
Salary—Operator	120.00
Miscellaneous Salaries	217.41
Heat, Light	82.65
Rent	200.00
Tax on Checks	1.19
Proj. Room & House Sup.	34.15
Freight	18.52
Insurance	14.60
Rental on Sound Equipment	78.85
Telephone and Telegraph	5.11
Office Supplies	2.26
Postage	6.68
Bank Charges	5.57
Taxes and Licenses	10.00
	<hr/>

Total Expenses 2,154.94

Loss—Coliseum Theatre, Juneau\$ 549.49

[468]

(Testimony of Charles M. Tuckett.)

November, 1933

Receipts, Box Office	\$1,899.15
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Expenses :

Film Rental	989.50
Advt. B. P.	103.50
Advt. N. P.	102.55
Advt. Misc.	61.59
Salary—Manager	83.33
Salary—Operator	90.00
Misc. Salaries	218.10
Heat and Light	106.05
Rent	200.00
Tax on Checks	.75
Proj. Room & House Sup.	16.57
Freight	24.44
Insurance	14.60
Rental on Sound Equip.	63.08
Telephone and Telegraph	9.86
Office Supplies	1.93
Postage	1.00
Bank Charges	3.32
Interest Paid	4.37
Service on Sound	11.67

Total Expense	2,106.21
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Loss—Coliseum Theatre, Juneau, Alaska.....	\$ 207.06
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December, 1933

Box Office	1,297.10
Slide Rental	65.00
Theatre Rental	100.00
	1,462.10

Expenses :

Film Rental	948.39
Freight and Express	18.39
Advt. B. P.	65.19
Advt. N. P.	87.50

(Testimony of Charles M. Tuckett.)

Advt. Miscel.	43.26
Salary—Manager	83.32
Salary—Operator	90.00
Salary—Miscel.	219.12
Booth and House Expense	34.42
Rent	200.00
Heat, Light and Water	125.20
Telephone and Telegraph	6.94
Office Supplies	4.36
Bank Charges	4.29
Tax on Checks (Cr.)	1.97
Insurance	30.35
Rental of Sound Equip.	63.08
	<hr/>
Total Expenses	2,021.84

Loss—Coliseum Theatre, Juneau\$ 559.74
[469]

January, 1934

Box Office \$1,727.05

Expenses:

Film Rental	\$ 912.25
Advt. B. P.	81.75
Advt. N. P.	94.85
Manager's Salary	83.33
Operator's Salary	90.00
Miscel. Salaries	213.00
Heat and Light	121.00
Rent	200.00
Proj. Room & House Sup.	9.10
Freight	3.32
Rental on Sound Equipment	63.08
Telephone and Telegraph	9.19
Insurance	14.60
Postage	5.00
Bank Charges	3.92
Tax on Checks	.71
	<hr/>

Total Expenses 1,905.10

Loss—Coliseum Theatre, Juneau\$ 178.05

(Testimony of Charles M. Tuckett.)

February, 1934

Box Office Receipts 1,732.80

Expenses:

Film Rental	\$ 876.50
Freight	33.62
Adv. B. P.	94.60
Adv. N. P.	71.40
Adv. Misc.	14.50
Manager's Salary	83.34
Operator's Salary	90.00
Misc. Salary	177.50
Proj. Room & House Sup.	
Rent	200.00
Heat, Light and Water	110.95
Telephone and Telegraph	7.22
Office Supplies	
Postage	1.50
Insurance	14.60
Maintenance	6.10
Bank Charges	3.32
Tax on Checks	.85
Rental on Sound Equipment	78.85
Taxes and Licenses	

Total Expense	1,864.85
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Loss—Coliseum Theatre, Juneau	\$ 132.05
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[470]

March, 1934

Box Office Receipts \$1,994.60

Slide Rental 70.00

	1,064.60
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Expenses:

Film Rental	1,265.50
Freight	33.00
Adv. B. P.	130.75
Adv. N. P.	112.00
Adv. Misc.	25.63

(Testimony of Charles M. Tuckett.)

Manager's Salary	83.33
Operator's Salary	90.00
Misc. Salary	187.11
Proj. Room & House Sup.	33.24
Rent	200.00
Heat, Light and Water	106.55
Telephone and Telegraph	7.19
Office Supplies	11.15
Postage	2.50
Insurance	14.60
Maintenance	
Bank Charges	5.37
Tax on Checks	1.09
Rental on Sound Equip.	63.08
Taxes and Licenses	12.00
	<hr/>
Total Expense	2,384.09
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Loss—Coliseum Theatre, Juneau\$ 319.49

April, 1934

Box Office Receipts 2,287.20

Expenses:

Film Rental	1,238.50
Freight	28.32
Adv. B. P.	169.13
Adv. N. P.	102.90
Adv. Misc.	79.87
Manager's Salary	83.34
Operator's Salary	90.00
Misc. Salaries	227.50
Proj. Room & House Sup.	39.66
Rent	200.00
Heat, Light & Water	98.60
Telephone and Telegraph	15.91
Office Supplies	5.50
Postage	3.75
Insurance	14.60
Maintenance	62.06
Bank Charges	5.30

(Testimony of Charles M. Tuckett.)

Tax on Checks	1.12
Rental on Sound Equip.	71.15
Taxes and Licenses	
Rental of Uniforms	6.00
Interest Paid	

Total Expenses	2,543.21
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Loss—Coliseum Theatre, Juneau	\$ 256.01
	[471]

May, 1934

Box Office Receipts	2,229.30
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Expenses:

Film Rental	1,327.25
Freight	27.58
Adv. B. P.	83.15
Adv. N. P.	106.75
Adv. Misc.	18.75
Manager's Salary	83.34
Operator's Salary	90.00
Misc. Salaries	227.50
Proj. Room & House Sup.	34.52
Rent	200.00
Heat, Light and Water	82.00
Telephone and Telegraph	10.12
Office Supplies	3.34
Postage	3.75
Insurance	27.12
Maintenance	40.89
Bank Charges	3.00
Tax on Checks	1.19
Rental on Sound Equip.	63.08
Taxes and Licenses	6.00
Rental of Uniforms	6.00
Interest Paid	6.12

Total Expenses	2,451.45
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Loss—Coliseum Theatre, Juneau	\$ 222.15
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(Testimony of Charles M. Tuckett.)

Thereupon witness Tuckett testified: Defendant's Exhibit M for identification is defendant's income tax return for 1929.

Whereupon the following proceedings took place:

Mr. HELLENTHAL: I offer that in evidence.

Mr. ROBERTSON: Same general objection, if the court please.

The COURT: It may be received.

Mr. ROBERTSON: Exception.

The COURT: You called for it yourself.

Mr. ROBERTSON: We wanted to inspect it, is all.

Q. Calling your attention to defendants' exhibit "M", that is Mr. Gross' income tax report for 1929? [472]

A. Yes.

Q. Does that show the same profits and losses you show in your tabulation for 1929?

A. I can't say exactly whether it shows the same or not.

Q. Is it calculated exactly the same way?

A. Yes sir.

Q. Did you prepare them?

A. Yes sir.

Q. You are familiar with them?

A. Yes.

Q. State whether that can be checked down to show the same system for Ketchikan your tabulation and reports show.

A. Yes.

(Testimony of Charles M. Tuckett.)

Q. Have the same methods been applied to that as to your report?

A. Yes sir.

Q. With reference to the films, for instance, do they show in there as expenses of the Coliseum theatre in Ketchikan and Juneau or in Ketchikan with the Alaska Film Exchange?

A. Alaska Film Exchange.

Q. Alaska Film Exchange is also calculated in that?

A. Yes sir.

Q. And what other theatres?

A. That is all in this one—the two theatres Juneau and Ketchikan and the Alaska Film Exchange.

Q. There were no other theatres at that time?

A. Not that Mr. Gross controlled.

Q. That is the only income tax report you made during 1929?

A. Yes.

Q. And that shows the situation as it is shown in your reports?

A. Yes, sir.

The COURT: Does that include other income except from these two theatres?

A. Yes. [473]

Q. (The COURT): Is it separated in such a way that it will be intelligible?

(Testimony of Charles M. Tuckett.)

A. The incomes do, but the expenditures is other than could be applied to the two theatres. It shows expenditures all over the circuit in different places.

Q. Show the expenditures over all the various circuits?

A. Well, it shows he has got receipts on that income from what he received from the apartments, and as we explained in the Juneau part of the salaries the full salaries included in that report are for only half charged to the Coliseum theatre?

Q. It shows here all charged to the Coliseum theatre?

A. It is all charged in the report we made, blanket report of salaries and expenditures and subtracted from the amount of money he received.

Q. How about the small theatres?

A. He was getting return from some of them.

Q. Does that show in here?

A. Yes.

Q. Under a separate head?

A. I will have to look and see—yes—this shows the total rent from the apartment and stores included in that item there.

Q. That doesn't show the expenses of the Coliseum by itself?

A. No sir.

(Testimony of Charles M. Tuckett.)

Q. Nor the expenses of the Coliseum in Ketchikan by itself?

A. No sir.

Q. It would require quite a little bookkeeping to arrive at your exact figures the way you have it segregated?

A. Yes, that is why we made the work sheets.

Q. But the ultimate result—is that the same?

A. Yes.

Q. That is, the profits shown were so much from Juneau or so much from Ketchikan, is that the same as the profit arrived at by you?

A. No.

Q. Why isn't it?

A. Because that was taken in blanket form.

Q. You took in more expenses, they wouldn't belong to the Coliseum theatre?

A. Yes. [474]

Q. Either at Juneau or Ketchikan?

A. Yes.

Q. So your profits would be somewhat larger than these?

A. Yes.

Q. That is due to the fact that you, as you say, took in other expenses in the Gross apartments, bills and things of that kind?

A. Yes.

Q. But are not charged in your report because they didn't belong to the theatre, is that true?

A. Yes sir.

(Testimony of Charles M. Tuckett.)

Q. I hand you here a paper marked 'M-1'.
Look at it and state what that is.

A. Income tax return for the year 1930,
covering all of Mr. Gross' business.

Q. Covering all the Gross theatres in operation,
of every kind?

A. Yes sir.

Q. What does that include?

A. All Mr. Gross' holdings.

Q. All of Mr. Gross' holdings. Did you prepare this?

A. Yes sir.

Mr. HELLENTHAL: I offer that in evidence.

Mr. ROBERTSON: We make the same general objection, if the court please.

The COURT: I think these both ought to be denied, at least for the time being. It is more confusing than anything else.

Mr. HELLENTHAL: The court rules out the previous one also?

The COURT: Yes.

Mr. HELLENTHAL: Let it be understood the previous exhibit is not in evidence, and this is also denied. And the court will make the same ruling on the income tax for 1931?

The COURT: Yes.

Mr. HELLENTHAL: We offer that and it may be ruled out; withdraw the previous offer, Your Honor.

(Testimony of Charles M. Tuckett.)

The COURT: Very well.

Mr. HELLENTHAL: Withdraw both for 1929 and for 1930 also. [475]

Thereupon Witness Tuckett further testified: I know defendant and was employed by him from 1925 to 1933 and was manager of the Juneau Coliseum Theatre and did other work for him besides from 1926 to 1933, also part of the time I was manager of the Ketchikan Theatre and of his smaller theatres in a way; the other regular manager of the Ketchikan Theatre was Louis Lemieux; we changed around about every year; I remember when sound equipment was installed in the Juneau Theatre in April or May, 1929, and in Ketchikan the following month; Harry Taylor was Installation Engineer and he came up with the equipment; I was his helper in assembling and installing it in both Ketchikan and Juneau; he explained the different parts to me and showed me how they went together and the workings of them; he did that with reference to each part; I was with him when he put them together, both in Juneau and Ketchikan; he gave me a general instruction how to keep up the equipment, make minor adjustments and repairs; also left me a manual; also I got several different volumes supposed to be authorities on equipment service and studied them; defendant raised my salary from \$150.00 to \$250.00 a month; after the equipment was installed in Juneau we went to Ketchikan where we proceeded in the same manner installing equipment;

(Testimony of Charles M. Tuckett.)

I stayed in Ketchikan six or seven months while Louis Lemieux was in Juneau; he was in Juneau but not in Ketchikan when the equipment was installed; he had gone through the same process I had with reference to the installation: I don't remember Witness Albright, I remember Witness Knowlton who came in, looked over the equipment, brought a lot of meters, tested the equipment, realigned the horns, saw the sound was right in the picture, gave it a general inspection to see that it was working right, I would say it was a thorough inspection; I was either here or Ketchikan when all the other inspection men were here that have been referred to in the evidence; I recall them all; I remember Darragh's name but not him; I never met Little; I remember Foulon; I don't remember Tobey; I remember Hurlburt, met him only once when he came down to the theatre; I remember Lawrence; I don't remember Smith, never met him.

I have gone over all of these inspection reports (plain- [476] tiff's exhibits Nos. 7 to 14, inclusive, Nos. 21 to 22, inclusive, and Nos. 23-A & 23-B) of Knowlton and the others and checked them carefully to see what these men did, and none of them report doing anything other than inspection and minor adjustments; these engineers, from first to last, did nothing except making inspections and minor adjustments, except Knowlton, who was the only man who did anything except inspection and minor adjustments; none of them, to my knowledge,

(Testimony of Charles M. Tuckett.)

made any real repairs; I don't remember whether any of these reports show any repairs made by them.

I inspected the machinery every night, made minor adjustments generally, same as the engineer does, checked the line voltage, back stage to the horns, each tube and different panels, exciter lights after the machine warmed up, the sound too if both horns were on while the machine was running; once a week go over the machines thoroughly to see they were oiled; every night, two or three times during the show, checked the sound to see if it had the right fader setting; whether good, bad or any trouble; pretty near every night we readjusted the photo electric cell; if a tube was weak, we put in a tube from the spare parts cabinet; on weekly inspections saw they had plenty of oil, machines cleaned up, no dirt in the lense; whether exciter light wasn't too dark or was performing as it should, seeing machine was all cleaned; every week we would go over the whole machine and, where there was any grease, wash it off with tetrachloride and any other dirt, clean it off; the service men who came up here and made inspections did nothing more than I did every day and every week; they sometimes made the same adjustments I made, because I never made adjustments until an hour or so before the show started at night; we would run it four or five hours the night and after the show you don't want to make adjustments, so we left it until the next day; the engineer usually came

(Testimony of Charles M. Tuckett.)

in the day time, morning or afternoon, consequently any adjustments necessary were caused through the last night's run; no engineer ever repaired the equipment, or [477] was ever present when there was real trouble or anything wrong; we had breakdowns or difficulties with the equipment.

Thereupon the following proceedings took place:

“Q. When did you have the first one—I mean the major ones—when did you have the first major breakdown that you had?

Mr. ROBERTSON: Object at this time to any testimony of any repairs or breakdowns in either of the two theatres, on the ground that more than two years ago we made demand on the defendant for a bill of particulars and motion to make more definite and certain his pleadings in this case, and an itemized statement of what repairs and major breakdowns he had in his machinery.

The COURT: What disposition was made of it?

Mr. ROBERTSON: It was overruled.

The COURT: The objection will be overruled.

Mr. ROBERTSON: Exception.

(Last question read).

A. When I was in Ketchikan right after the installation, two or three months after the installation.

Q. How serious was that breakdown?

A. Well, my machine was dead.

(Testimony of Charles M. Tuckett.)

Q. Who fixed it?

A. I did, and Mr. Fox, radio operator in Ketchikan.”

Whereupon Witness Tuckett further testified: Fox had nothing to do with plaintiff; there was no service man in sight at that time; none I could get right away, not without waiting at least two or three days, I couldn't say whether he could ge there faster or not. I think the next major breakdown was in the spring of 1930, it was a short circuit in the pre-amplifier; I couldn't use my disk; it blew out the fuse in the battery room; Ned Lemieux, the operator at that time, fixed it; there was no service man here at that time and I did not know there was one; I wired Seattle; they gave me data where to find the trouble, also told me a fellow named Smith was on the Northwestern and he would stop off with equipment. Of these three telegrams, the first one is the wire I sent to plaintiff in Seattle, the second, their answer, and the [478] third from Smith.

“Mr. HELLENTHAL: I offer them in evidence.

Mr. ROBERTSON: No objection other than I object to maintain my objection to this whole line of any testimony relative to any breakdown.

The COURT: It may be received.”

(Testimony of Charles M. Tuckett.)

Whereupon three telegrams were received in evidence, marked

PLAINTIFF'S EXHIBIT N,

and read as follows: [479]

“Collect Black Juneau Alaska Jan 17 1930

Electrical Research Products

458 Skinner Bldg Seattle

We have a short in our equipment when we throw lever from film to disc We blow out fuse in battery room Cant use disc film Side okay Advise how to find trouble Must know as it is impossible to get service man here in time

Coliseum Theatre

—
Seattle, Wash. January 17, 1930

Coliseum Theatre, Juneau, Alaska.

Check disc signal lamp for short circuit. stop. Remove cap and signal lamp. stop See Engineer E. V. Smith aboard Northwestern under instructions to service your equipment. Keep us advised.

Electrical Research Products, Inc.

Chge. Electrical Research Products, Inc.,

Service Dept.

458 Skinner Bldg.

(Testimony of Charles M. Tuckett.)

SS Northwestern—Juneau ALS

January 19 1930 5 PM

Charles Tucket

Coliseum Theatre

Juneau (Als)

Meet me at theatre Mondy eight AM Electrical
Research Engineer

E V Smith

535 PM" [480]

Whereupon Witness Tuckett further testified: Smith didn't show up for the appointment; the equipment had already been fixed when I received that wire from Seattle; the other trouble I had was that one of my drives froze up on the left hand machine; a little later than this, if I remember right, it was during Foulon's time but he was to the Westward, by which I mean Fairbanks, Anchorage, or somewhere to the Westward and there was no engineer here; I did not try to get one.

"Mr. ROBERTSON: Same objection to this testimony, if the court please.

The COURT: Same ruling.

Mr. ROBERTSON: Exception."

We tore down the drive and I and Zolman Gross fixed it; the trouble was that some new packing, Foulon had put in, hindered the oil from going to the shaft or got tangled up in the shaft, anyway

(Testimony of Charles M. Tuckett.)

it was froze; there were no more breakdowns of that kind; I had no schedule of Foulon's travels, I didn't know where to reach him, when he was to the Westward, or of Lawrence's travels; I don't remember Lawrence ever making any repairs to our equipment; I went over his reports.

Whereupon the following proceedings took place:

“Q. Do they show any repairs?

Mr. ROBERTSON: Object, the report is the best evidence.

A. Yes.

Mr. HELLENTHAL: That would be true ordinarily but this is an expert interpretation of something most of us don't know very much about.

The COURT: I think in view of the complicated nature of the reports he may answer.

Mr. ROBERTSON: Exception.

A. Not that I remember.

Q. Did you go over them?

A. Yes.

Q. For that purpose?

A. Yes.

Q. Would you remember them if you had found them?

A. I don't remember everything in there.

[481]

Q. Did you go over them with a view of finding out whether there were repairs?

A. Yes.

Q. Did you find any?

A. No, sir.”

(Testimony of Charles M. Tuckett.)

Thereupon Witness Tuckett further testified: Defendant went East in the fall of 1929, I don't remember the month; I received some bills, statements and communications from plaintiff in respect to service charges after, but not before, his departure; I received these contracts, plaintiff's exhibits Nos. 2 and 4, the latter part of 1929; don't remember the exact date, but after defendant went East; I also received a bill and I tried to get in touch with defendant about it but didn't succeed; these contracts I put them in my daily reports or messages to him and forwarded to him but they didn't reach him, because I received them back in Juneau; I don't remember the date I received this letter from plaintiff dated September 12, 1929, but it was while defendant was on his trip East.

Whereupon plaintiff's letter to defendant dated September 12, 1929, was received in evidence, marked

DEFENDANT'S EXHIBIT O.

and reads:

“September 12th, 1929.

Mr. W. D. Gross,
c/o Coliseum Theatres,
Juneau, Alaska.

RE: Coliseum Theatre,
Juneau, Alaska
Ketchikan, Alaska.

Dear Sir:

Enclosed you will find statement on the Coliseum Theatre at Juneau, Alaska, showing due the sum of

(Testimony of Charles M. Tuckett.)

\$541.10 and on the Coliseum Theatre at Ketchikan, Alaska, showing due the sum of \$481.60. You will also notice that we have added to these statements ten additional weeks at the rate of \$29.75, as we assume that it will take at least that time to receive your reply with remittance enclosed.

Upon receipt of this letter will you please place in the mail your remittance of \$836.60 on the Juneau account and \$779.10 on the Ketchikan account so that we may bring these accounts up to date without further delay. [482]

We also suggest that you arrange to mail your remittances weekly in advance as provided in your agreement and it would also assist us if you would write us in detail explaining the mailing time from your town to this city so that we may know just when to expect your remittances.

Your prompt attention will be appreciated.

Very truly yours,

R. HILTON,

Collection Department.

RH:ECS

CC: Ketchikan, Alaska.”

(Testimony of Charles M. Tuckett.)

ELECTRICAL RESEARCH PRODUCTS INC.

ACOUSTIC DEPARTMENT

250 West 57th Street, New York City

\$29.75

Statement of account of

W. D. Gross,

c/o Coliseum Theatre,

Sept. 11, 1929

Juneau, Alaska.

249700

Invoice No.

Date	Invoice No. or week ending	Amount	Totals
Dr 04 12 9	9727	5.60	
Dr 05 18 9		29.75	
Dr 05 25 9		29.75	
Dr 06 01 9		29.75	
Dr 06 08 9		29.75	
Dr 06 15 9		29.75	
Dr 06 22 9		29.75	
Dr 06 29 9		29.75	
Dr 09 06 9		29.75	
Dr 07 13 9		29.75	
Dr 07 20 9		29.75	
Dr 07 27 9		29.75	
Dr 08 03 9		29.75	
Dr 08 10 9		29.75	
Dr 08 17 9		29.75	
Dr 08 24 9		29.75	
Dr 08 31 9		29.75	
Dr 09 07 9		29.75	
Dr 09 14 9		29.75	541.10

10 additional weeks @ \$29.75

297.50

838.60

(Testimony of Charles M. Tuckett.)

ELECTRICAL RESEARCH PRODUCTS INC.
ACOUSTIC DEPARTMENT

250 West 57th Street, New York City

\$29.75

[483]

Statement of Account with

Sept. 11, 1929

W. D. Gross,
c/o Coliseum Theatre,
Ketchikan, Alaska.

249600

Date	Invoice No. or week ending	Amount	Totals
Dr 04 12 9	9726	5.60	
Dr 06 01 9		29.75	
Dr 06 08 9		29.75	
Dr 06 15 9		29.75	
Dr 06 22 9		29.75	
Dr 06 29 9		29.75	
Dr 07 06 9		29.75	
Dr 07 13 9		29.75	
Dr 07 20 9		29.75	
Dr 07 27 9		29.75	
Dr 08 03 9		29.75	
Dr 08 10 9		29.75	
Dr 08 17 9		29.75	
Dr 08 24 9		29.75	
Dr 08 31 9		29.75	
Dr 09 07 9		29.75	
Dr 09 14 9		39.75	481.60
10 additional weeks @	29.75		297.50
			<hr/> 779.10''

(Testimony of Charles M. Tuckett.)

Thereupon Witness Tuckett further testified: I never received any statement or letters with respect to service charges before that letter; these four telegrams I now produce were telegrams received from plaintiff and answers to them during 1929.

Whereupon telegrams from plaintiff to defendant dated October 11, 1929, and November 12, 1929, and telegrams from defendant to plaintiff dated October 11, 1929 and November 27, 1929, were received in evidence, marked

DEFENDANT'S EXHIBIT P,

and respectively read:

“El New York NY Oct 11 1929

W D Gross Coliseum Theatre

Juneau

Felt sure my letter of September fifth attaching agreements with regard to service charge would meet with immediate favorable response on your part by executing and returning same together with your check for back dated service charges stop you owe six hundred ninety one dollars thirty five cents for Coliseum Juneau and six hundred thirty dollars thirty-five cents for Coliseum Ketchikan [484] Alaska stop please favor us with these checks at once also return *three* special agreements covering service charge and oblige

Electrical Research Prods. Inc W Dun 225PM

(Testimony of Charles M. Tuckett.)

Oct. 11, 1929

W. Dun

Electrical Research Products Inc.

New York, NY.

In regards to service agreement Mr. Gross has them with him personally and he is on his way east to take matter up with you direct. All your letters etc have been forwarded to him so persume you will hear from him direct or see him in person.

Collect.

Coliseum Theatre

—

El New York NY Nov 12 1929

Mr. Gross

Mgr Coliseum Theatre Juneau

No reply received letters September twenty fourth stop Coliseum Theatre Juneau in arrears seven hundred fourteen dollars weekly billing and seven dollars and fifty cents merchandise stop Coliseum Ketchikan in arrears seven hundred fourteen dollars weekly billing and eight dollars and sixty cents merchandise stop this constitutes default unless payment received immediately shall avail ourselves of protection provided in contract and refer accounts to legal department

Electrical Research Products Inc

R A. Quinn

922 AM

—

NL Collect

Nov. 27 1929

R Q Quinn Electrical Research Products

New York NY

As we have wired before Mr Gross either in New York or on way to Seattle he has your letter con-

(Testimony of Charles M. Tuckett.)

tracts wires etc can not do anything on service charges until he okays them have your Seattle representative take this matter up with him when he arrives there around twenty fifth he stops at Atwood Hotel Seattle we have remitted for small items first of month

Collect

Coliseum Theatre. [485]

Thereupon Witness Tuckett further testified: I recognize this check drawn on B. M. Behrend's Bank dated January 1, 1930, for \$301.10. At that time I was acting for defendant's Coliseum Theatre.

Whereupon check dated January 1, 1930, was received in evidence, marked

DEFENDANT'S EXHIBIT Q

and reads:

"No. 74

Juneau, Alaska, Jan. 1, 1930

Pay to the order of Electrical Research
Products 301.10

Three Hundred One Ten Cents.....Dollars

To THE B. M. BEHREND'S BANK

COLISEUM THEATRE

Juneau, Alaska. By Mrs. W. D. Gross, W. D. Gross"

Thereupon Witness Tuckett further testified: I sent this telegram dated February 3, 1930, to plain-

(Testimony of Charles M. Tuckett.)

tiff in Los Angeles in answer to a wire I received from Pearsall.

Thereupon defendant's telegram to plaintiff dated February 3, 1930, was received in evidence, marked

DEFENDANT'S EXHIBIT Q-1,

and reads:

Juneau Alaska Feb. 3, 1930.

R. H. Pearsall

Electrical Research Products Inc.

Los Angeles, Calif.

Check covering your account mailed twenty eighth receipt bill return to Juneau what is the matter we can not get replacements on two three nine tubes we have four coming none arrived yet at present we have no spare on this tube must have spares also we are entitled to more than twenty minutes service per month which is about all we get

Coliseum

Night Letter Collect.”

Thereupon Witness Tuckett further testified: That check, defendant's exhibit Q, was for repairs, exciter lights, some more repairs for Ketchikan, some tubes, some exciter lights and some service; when I sent that check I had not heard anything from defendant about what happened in Seattle between him and Gage but before I had paid out this check I had received a letter from him stating he had signed for service; I had received bills dated

(Testimony of Charles M. Tuckett.)

December 31, 1929, after the first of January, 1930, and I included [486] service charges in that check for January, 1930, because I figured after I read defendant's letter that we had to pay service charges so when I drew the check for the amount of the parts I added it into the check, making \$119.00 for each house; I actually made out that check after Mrs. Gross came home about January 20; defendant was not in Juneau; he arrived some time in February; the check is signed by Mrs. Gross because I had run out of signed checks that defendant left me so I took it up to her and had her sign it, which was my custom when I was out of checks and defendant wasn't in town, then Mrs. Gross had authority to sign checks; while the check bears date of January 1, 1930, that was not the date she signed it; it was actually made out January 20; it was dated January 1 because I made out checks for all the bills for December that were payable and dated them all January 1 after Mrs. Gross returned; the only thing I knew then about the service charges was that Gross had signed for service; I had authority from Gross to draw this check only for parts but no authority to pay service charges, but paid them on my own hook; when the equipment got out of repair that I couldn't fix myself, I sent it to Seattle to plaintiff, who repaired it and charged it to us, which happened three or four times; I know of two times which show on these four bills.

(Testimony of Charles M. Tuckett.)

Whereupon two bills were introduced in evidence marked

DEFENDANT'S EXHIBIT R,

and read:

“ELECTRICAL RESEARCH PRODUCTS INC.
ACOUSTIC DEPARTMENT
250 West 57th St., New York

Contract No.	Refer to	
Customer's	Invoice No.	105452
Order No.		
Requisition No	InvoiceDate	Dec. 31, 1929

COLISEUM THEATRE
119 FRONT ST.
JUNEAU, ALASKA

COLISEUM THEATRE
405 MISSION ST.
KETCHIKAN, ALASKA

[487]

How shipped and	Serve. Eng.	
route	Seattle Emerg. Stock	62-1701

Repairs on the following

1-A Aperture	16.00
555-W Receiver	\$20.00

Sdo. 48675 Signed by L. C. Lemieux

(Testimony of Charles M. Tuckett.)

ELECTRICAL RESEARCH PRODUCTS INC.
 ACOUSTIC DEPARTMENT
 250 West 57th St., New York

Contract No.	Refer to
Customer's	Invoice No. 105625
Order No.	
Requisition No.	Invoice Date 12/31/29

COLISEUM THEATRE,
 JUNEAU, ALASKA

Shipped to same
 & destination

Date shipped

How shipped & Mail F.O.B. Seattle-Emer-Stock
 route 62-1776

Repairs on the following

1	4-A Reproducer	4.50
	SCO 56437 Signed by Chas. M. Tuckett"	

Thereupon Witness Tuckett further testified: The first bill is for repairs on a 555-W receiver and new aperture plate, I think plaintiff put in, the second bill is repairs on a 4-A reproducer, which was used in connection with the sound equipment and which was sent to Seattle for repairs as we couldn't get it repaired here and the service man advised us to send them to Seattle; he either couldn't or didn't repair them; I identify this check you hand me.

(Testimony of Charles M. Tuckett.)

Thereupon check was received in evidence, marked

DEFENDANT'S EXHIBIT S,

and reads: [488]

“No. 59

Juneau, Alaska, Nov. 1 1930

Pay to the order of Elec Research Products \$500.00
Five Hundred Dollars Only.....Dollars
To THE B. M. BEHREND'S BANK

Juneau, Alaska

ALASKA FILM EXCHANGE

By W. D. GROSS Manager”

Witness Tuckett further testified: I sent that check to plaintiff; this letter addressed to defendant from Mott Vallee and Grant was received in due course in the mail.

Whereupon letter to defendant, dated October 23, 1930, from Mott, Vallee and Grant was received in evidence, marked

DEFENDANT'S EXHIBIT S-1,

and reads:

“Law Offices

MOTT, VALLEE AND GRANT

Suite 1215 Citizens National Bank Bldg.

Los Angeles

October 23, 1930.

Mr. W. D. Gross,
c/o Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Our client, Electrical Research Products, Inc., has placed in our hands for immediate action the

(Testimony of Charles M. Tuckett.)

matter of your delinquency under license agreement of March 28, 1929, covering the Western Electric sound equipment installed in your theatres.

The delinquency against your Coliseum Theatre at Juneau, amounts to \$797.94, and that of the Coliseum Theatre at Ketchikan to \$840.00, or a total of \$1638.58, as of September 27, 1930.

It is imperative that this delinquency be taken care of at once, or some suitable arrangement for its payment made with us; otherwise, we are instructed to take immediate steps to disconnect your equipment and collect the indebtedness.

Kindly communicate with us at once.

KEG:H

Yours very truly,
(Signed) K. E. GRANT
for
Mott, Vallee & Grant.

(Pencil notation:—Soon as Mr. Gross arrives we will forward a check to the company 500.00 the full amount will be remitted as soon as we can take care of it as biz bad.)”

Thereupon Witness Tuckett further testified: This letter dated November 20, 1930, is my reply to that letter from Mott Vallee and Grant.

Whereupon defendant's letter signed by Tuckett, addressed [489] to Mott, Vallee and Grant was received in evidence, marked

DEFENDANT'S EXHIBIT S-2,

and reads:

(Testimony of Charles M. Tuckett.)

“Nov. 10, 1930

Mott, Valee and Grant

Law Offices

Los Angeles, Calif.

Gentlemen:

Your letter of Oct. 23 received and in regards to the amount we owe the Electrical Research Products will state.

That we have already forwarded them a check for the amount of \$500.00 in part payment of this account. The balance we will take care of just as soon as it is possible.

We wish that you would take up with these people in regards to their service and the amount that we have to pay for same. In the first place the service charge is very much too high for the amount of business that we are doing and the second place their service is far from being satisfactory.

We have taken this matter up with them before but to date they have failed to reply to same.

Hoping that this will be settled satisfactory to both partys I remain,

Very truly yours,

C

Mgr.”

Thereupon Witness Tuckett further testified: I recognize plaintiff's exhibit No. 38 (letter from defendant to plaintiff dated November 1, 1930); a check for \$500.00 was sent by defendant with that letter, plaintiff's exhibit No. 38; we received the

(Testimony of Charles M. Tuckett.)

letter from Mott Vallee and Grant (exhibit S-1), when defendant was in Juneau and we talked it over pro and con, noticed the service charges were going up; there was nothing we could do; thought defendant would have to go outside to straighten it up, so decided to send a check to plaintiff and not to Mott, Vallee and Grant because we didn't want them to have the habit of having to send the check to the attorney, we wanted to stall them off for time until defendant could go out and straighten up the account and see if we couldn't come to some arrangement with these people; the letter from Mott Vallee and Grant had something to do with our decision, he said he was going to disconnect our equipment; this was the [490] climax of it all; we had wires from plaintiff all summer and fall; we wanted to stall them off; I would not have sent that \$500.00 but for the threat in the letters; I believed they would execute the threat; I sent the \$500.00 because I believed they would disconnect the equipment, these guys, and I didn't want to take any chances of the equipment being disconnected, wanted to try to straighten this matter up, so we sent the check November 1st. Defendant wrote them a letter and on the 10th of the month after the check come around we had already sent the check. Defendant agreed to that procedure; he was going out as soon as he could, he had other business to look after in Alaska; I made a notation on that letter as defendant and I were talking. It just says "as soon as Mr. Gross arrives will for-

(Testimony of Charles M. Tuckett.)

ward check for \$500.00;" that was just a stall again so Gross could go down and get some action; defendant's letter tells of hard times and bad business, we didn't have bad times at that time but we put it in the letter because we always claim we have hard times when we ask for a reduction; the real reason we put it in the letter was just as a stall; this all happened in the fall of 1930.

In the spring of 1931 Attorney Robertson got the account; I don't think defendant had gone below before that time; I don't think he was able to, he was busy with other matters; after Robertson got the account he wrote a letter or called up, I forget which, and asked us what we were going to do with it; I tried to reason with Robertson and he said it was due and he was going to collect it; I tried to stall him off; don't remember just what I did; I still wanted time and figured when Gross got to Seattle he could straighten it out and at last Robertson filed suit for service charges and attached defendant's box offices both in Juneau and Ketchikan; we put up a bond and then Robertson either called or wrote Gross a letter and at that time I think he asked Gross to go up, but in place of Gross going up, I went up and had a talk with him and asked him why he didn't come up and ask me, that I [491] would put a bond up; instead of that Robertson told me right out he was going to collect that \$1600.00 or take the equipment out, he was through monkeying with Gross.

(Testimony of Charles M. Tuckett.)

This paper, defendant's exhibit A for identification, is the paper Ralph Lawrence handed me a little bit later, that night, during the show; I don't remember the exact date, but it was after the bond was put up.

Thereupon paper was received in evidence, marked

DEFENDANT'S EXHIBIT A,

and reads:

“On behalf of the Electrical Research Products, I hereby notify you that W. D. Gross has defaulted in the license agreement relative to the Western Electric Company Sound Reproducing Instrument now in this theatre and that under that agreement the Electrical Research Products is entitled to disconnect said instrument and to render the equipment thereof inoperative, and, on behalf of the Electrical Research Products, I hereby make demand upon you for immediate admission to said instrument for the purpose of disconnecting it and rendering its equipment inoperative.”

Thereupon Witness Tuckett further testified: After I left Robertson's office I went over and told Gross we had stalled this thing off as long as we could and he was going to take the equipment and the best thing Gross could do was to go to Seattle

(Testimony of Charles M. Tuckett.)

and get the best equipment he could and get it right away and he left on the steamer Rogers for Seattle. I next saw defendant [492] when he returned; he brought the equipment with him; immediately after he returned, we received the replevin from Marshal White, who brought it with his two deputies; they served the papers on Gross, he called up Si Hellenthal and told him to come up; then we walked up to the booth; in the meantime Robertson arrived there about practically the same time as Si Hellenthal and we argued quite a bit, sitting in the seats and arguing about it; we asked him for more time; we wanted more time to put up equivalent amount of bond so we could read the papers and go get legal advice on it; after arguing a while Robertson said, "I am not going to wait any longer. I am through fooling with your people. Pull it out. Pull the equipment out."; then White asked me to open the door and I refused and he told one of his deputies to get a crowbar; I asked him if he was going to bust it, and he said yes, and then I opened it and Lawrence started to disassemble the equipment and take out all spare parts, photo electric cell, make the machine so you couldn't operate.

Whereupon the following proceedings took place:

"Q. To what extent did Mr. Lawrence go, to, at that time, or immediately after that, in dismantling the equipment?"

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial.

The COURT: He may answer.

(Testimony of Charles M. Tuckett.)

Mr. ROBERTSON: Exception.

A. He started on the amplifier and started to dismantel and take it down. We started to work and taken off our own equipment which is the lamp house there and the upper magazine and your machine head under the projector head.

Q. To what extent was the equipment finally dismantled?

A. Clear down to the main base.”

Thereupon Witness Tuckett further testified: I couldn't put it together after that, neither could defendant nor anyone but Lawrence; we didn't have a blueprint, the thing was entirely useless so far as we were concerned; I don't think Gross said anything [493] about throwing the equipment in the bay; I might have said it; it is a common remark of mine; nothing serious about it; just a mere statement that I should have thrown it in the bay.

This bundle of papers, now handed me, contains the bills covering the cost of the new equipment defendant bought; the equipment he brought up from Seattle at the time the Western Electric equipment was taken out under the replevin suit.

Thereupon defendant offered in evidence defendant's exhibit T for identification, to which plaintiff objected on the ground it was incompetent, irrelevant, and immaterial and had nothing to do with the true measure of damages in this action, which objection was overruled, to which plaintiff then ex-

(Testimony of Charles M. Tuckett.)

cepted. The papers were then received in evidence, marked

DEFENDANT'S EXHIBIT T,

and contain a list of itemized bills and invoices, together with the following tabulated statement thereof, viz:

“Tabulation of cost of installation of new equipment in Coliseum theatre at Juneau, and Coliseum theatre at Ketchikan, April 1931:

UNIVERSAL HIGH POWER

Paid for machines.....	\$3,885.19
2 Pre-amplifiers and parts.....	1,000.00
Installation costs	372.65
	<hr/>
Total.....	\$5,257.84

one half of which defendant and his witness Tuckett testified applied to the Juneau theatre, and one-half to the Ketchikan theatre. [494]

Thereupon Witness Tuckett further testified: Defendant's exhibit T shows the cost of the two equipments defendant brought up for Juneau and Ketchikan to take the place of the replevined equipments; they cost \$3,338.19—two pre-amplifiers and parts \$1,000.00, installation cost \$372.65, total \$5,257.84, divided equally between the two machines so that each cost one-half thereof.

Thereupon the following proceedings took place:

(Testimony of Charles M. Tuckett.)

“Q. Mr. Tuckett, how did the sound of these new machines compare with the sound of the Western Electric machines that had been re-plevined?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial, no foundation laid.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

A. There is no comparison in the two.”

Thereupon Witness Tuckett further testified: By no comparison I mean the quality was far greater in the Western Electric very much better than in the other; we got those two pre-amplifiers for which we paid \$500.00 apiece to try and improve on it after the original installation, but they caused us more trouble than before and we were never able to improve that equipment to make it as efficient as the other.

Cross Examination.

Thereupon Witness Tuckett further testified: In Direct Examination I did not read all of the pencil notation at the bottom of the letter (defendant's exhibit S-1) that Mott Vallee and Grant wrote to defendant, because it didn't pertain to it all; the whole of that notation reads:

“As soon as Mr. Gross arrives, will forward a check to your Company for \$500.00, the full amount will be remitted as soon as we can take care of it as business is bad,”

(Testimony of Charles M. Tuckett.)

which statement was not true but was false; defendant signed the letter dated November 1, 1930, (plaintiff's exhibit No. 38); the statement in his letter of November 1, 1930, that [495]

“Just as soon as business picks up a little and I am able I will again remit to you. As it is now business is very bad and we are hardly ever out of the red,”

is false, not a true statement; it was a stall.

I was more or less of a general manager for Gross, having charge generally of all of his affairs when he was away from Alaska and, if he was away from Juneau, then I had general charge of his affairs in Juneau until he got back or until I could get in touch with him and if he was entirely out of Alaska I had charge of all of his business.

I don't know where the letter now is that defendant wrote to me before I made out the check, signed by Mrs. Gross, dated January 1, 1930, defendant's exhibit S; I last saw that letter about a month after I received it; I received the intimation from it that defendant had arranged to pay service charges and upon the strength of that intimation I prepared that check and had Mrs. Gross sign it; I never heard anything to the contrary until defendant got back some time in February, 1930, and happened to take over his business, that is the first time I ever heard anything about defendant's signing those letters (plaintiff's exhibits Nos. 2 and 4) under any threat; he made no mention of that in his letter to me;

(Testimony of Charles M. Tuckett.)

I had the privilege of drawing checks on defendant's account without his authority; he left the checks with me and I had the privilege of filling them in and giving them out; if he was out of town I could have the checks O.K.'ed by Witness Mullen or Mrs. Gross; I didn't draw any checks other than under that authority; he didn't authorize me to draw each individual check; if I said it was O. K. I drew a check for it and defendant didn't question the matter; he never questioned my drawing a single one of these checks; there was no limit to my authority to draw checks.

The day the equipment was replevined I heard the statement made there then to throw the stuff in the bay; to my recollection I made the statement; not defendant; I am positive Lawrence [496] served upon me that demand, defendant's Exhibit A; Witness Monagle might have been there; I didn't pay any attention to whether Witness Monagle personally served the demand upon me, it didn't mean anything to me; I don't think Attorney Robertson came there with two deputies in the first place; he did not attempt to knock down the door; I remember he said he was through fooling with us and to get the equipment out: Si Hellenthal, Witness Clayton, myself, White, Martin, and Newcomb were present when he made that statement which was outside the booth on the balcony; I don't remember any other exact words that Robertson said except we wasn't going to have any more time and he told Mar-

(Testimony of Charles M. Tuckett.)

shal White to jerk out the equipment; he didn't tell Marshal White that he had a valid writ in his hands and as the United States Marshal, it was up to him to do what he wanted to do with it, and then turned around and walk out; I am positive Robertson didn't do that.

I had a conversation with Robertson in his office after he filed suit for the service charges; I really don't know whether we had a conversation before that, I think we did; I had been to his office and promised to pay the account; I promised to send a check down for it; and subsequently promised to give him a check for \$500.00 on account; at that time I said nothing to him about making such payment under protest; I don't remember whether at that time I told him anything about service charges or that there were no service charges honestly due; I never had any authority to actually sign a check for defendant but I had authority to draw one, but my signature was not good on a check; I wouldn't say that the reason why I didn't pay Robertson at that time was because I had no signed checks.

Gross went East some time in September, 1929, I don't remember the exact date; he didn't take or have with him those contracts, plaintiff's exhibits Nos. 2 and 4; we had no bills about service charges up to the time of his departure; when I made the statement, "Mr. Gross has them with him personally and he is on his way East to take the matter up with you direct." In the telegram [497] dated October 11, 1929, one of the telegrams included in

(Testimony of Charles M. Tuckett.)

defendant's exhibit P, I meant I had sent the contracts to defendant and presumed that he had received the letter, and believed he had them with him, until the letter was returned; I sent them to him and it turned out afterwards they had followed him all over the country; that is also true of the statement made by me in the telegram of November 27, 1929, another telegram that is part of defendant's exhibit P; I figured he had them with him somewhere; I got them back here around in January some time; I never got them back until the post office returned them; defendant left forwarding addresses in each place.

When I commenced to operate the talkie sound equipment I had the original Western Electric book, also Richardson's Handbook and I have two or three other books in my library in Portland; my main one was Richardson's, then this little bulletin book that plaintiff had out at first; I studied Richardson's article in the Herald World dealing with sound; I read these other books but I don't remember their names; I used them mostly as reference; they are now in Portland, Oregon; they were published about 1929 or 1930.

I am familiar with defendant's exhibits H-1 to H-7, both inclusive; some of the original entries therein were made by me and some by defendant; the checks out of defendant's exhibits H-6 and H-7 were drawn on the Miners & Merchants Bank in Ketchikan, but the books were kept in Juneau;

(Testimony of Charles M. Tuckett.)

defendant kept only one bank account in Ketchikan in connection with his Coliseum business there; that is that only bank account he had there; in Juneau defendant did business with The B. M. Behrends Bank and carried three accounts, keeping his Sitka Theatre separate, also having an account in the Behrends Bank for the Alaska Film Exchange, which are exhibits H-1 and H-4; all checks of which entries were made in exhibits H-1 and H-4, were drawn on the bank account of the Alaska Film Exchange in Behrends Bank in Juneau, and all checks referred to in defendant's [498] exhibits H-2, H-3 and H-5, were drawn on the Coliseum Theatre account in the Behrends Bank in Juneau.

There are the only records defendant has—these books, defendant's exhibits H-1 to H-7, both inclusive; defendant also had bank deposit books which I saw, but concerning which you would have to ask defendant; they were just a matter of form in the records of his business as we used duplicate deposit slips, which are still on file and which we have for some years, but we haven't a full complete line of them because they were destroyed after the figures were checked; I couldn't say whether the bank books themselves were destroyed.

It was the custom during the time I was connected with defendant's two theatres to keep a daily record of admission in those theatres, which was kept on a daily report, so many admissions for a certain price and then the total, which statements

(Testimony of Charles M. Tuckett.)

have been destroyed; we didn't keep them after they had once been checked, and checked by the Government; so we could have both records here, whoever was in charge in Ketchikan would forward the daily statements to Juneau, and in addition to the daily statements there was a duplicate deposit slip for the money taken in; in 1929 at one time we had all those for the Juneau and Ketchikan theatres in Juneau, all of which were destroyed right away after Clauson, tax income man, had checked the past years, including 1929 and I think 1930; for 1930 whoever was in charge in Ketchikan sent all of those returns of the Ketchikan Theatre to Juneau but I couldn't say when they were destroyed, not for some time afterwards; we usually held them around a year; the 1930 income tax return wasn't settled by the income tax collector for some time but I don't remember when; it took considerable time for both the 1929 and 1930 returns; defendant made his 1931 return around March 15, 1932; I think all those returns were destroyed just before I quit about May 1, 1933; I cleaned up a lot of stuff at that time; defendant had similar returns for the Juneau Theatre for 1931, 1932, and the first four [499] months of 1933; neither 1933, nor 1932 had been destroyed.

Since I came here on this case I have made my headquarters in defendant's office but I haven't seen those returns around; they were the records of defendant's moving picture business at Juneau and

(Testimony of Charles M. Tuckett.)

Ketchikan; after defendant once checked them they were no good to him; just used the money deposited in the bank; I couldn't say whether all those records, except 1929, were destroyed after April 20, 1931.

Defendant's exhibits Series I, J, Series K, and L, were all prepared by Witness Stabler and me; I told Stabler the accounts and he tabulated them; the only thing I had to do with it was to segregate the expenses of the theatres; I know they are correct as far as I can possibly get them correct; all the data shown on those exhibits is contained in those seven books, defendant's exhibits H-1 to H-7, inclusive; there is no data in those exhibits taken from any other source than defendant's exhibits H-1 to H-7, both inclusive, except capitol investment which was taken off the income tax returns; but for all the rest, every item in there, there is a check in one of those books to cover it; the summaries, defendant's exhibits Series I and K that I read to the jury, those receipts are reflected in the particular check book here that covers the particular period that I read, and the disbursements are all reflected in that book, in other words, these summaries are simply the total aggregate for the month shown in that particular check book; in the Juneau account the Alaska Film Exchange had at one time or other deposited money to the Coliseum Theatre, for instance here in defendant's exhibit H-2, on April 18, 1929, \$2,000.00 was deposited to the Alaska

(Testimony of Charles M. Tuckett.)

Film Exchange by The B. M. Behrend's Bank; when I prepared the statement, in defendant's exhibit Series K, of Juneau for April, 1929, those accounts were not taken into consideration at all; the only consideration we had was of the actual deposit the theatre made; I am now speaking of \$200.00 that defendant got on a note at the B. M. Behrend's Bank and deposited to the [500] Coliseum account; neither it nor the \$2,000.00 note I spoke of was taken into consideration in the receipts, for instance, that \$2,000.00 appears in the distribution for April, 1929, in exhibit H-2, but not in the figures of the receipts which are on the left; for instance, April 4, \$104.80, on the 6th, \$101.10, those are the actual receipts; each account in those exhibits H-1 to H-7, both inclusive, if there is a check there I know personally what it is and I can explain each individual check; for instance on exhibits Series I and K, we have listed amounts of checks with names and everything; the only thing that would be in dispute would be those we omitted; the receipts can be checked by either adding the figures on the side of say exhibit H-5, or turning to the distribution where it gives the exact receipts for the month, which have been checked and rechecked; at the top is receipts for the month, which would be checked from the daily deposits.

The distribution in the check books, H-1 to H-7, both inclusive, doesn't necessarily cover all the de-

(Testimony of Charles M. Tuckett.)

posits entered in the books; there are no deposits in defendant's exhibit H other than actual theatre deposits; in exhibits H-1 to H-7, are deposits made from other sources and receipts from admission to the Gross Coliseum Theatres; we have taken money from the Alaska Film Exchange and put it into the Coliseum in one of them, which happened quite frequently in 1929 and 1930, but no credit was given any place for that here, or in any ledger or journal; that money was turned over to the Coliseum Theatre because of shortage; checks were drawn in the Coliseum Theatre, there was money in the Alaska Film Exchange, so we transferred the account; that happened because defendant drew exceedingly heavy on them; from the Juneau Theatre account he paid more than the theatre expenses; the Juneau and Ketchikan Theatres had sources of revenue other than receipts in the box office, for instance, they had the Alaska Film Exchange which put money into these accounts and at different times we put money into them from Petersburg and Wrangell; that wasn't part of the earnings [501] of either of those theatres, but it wasn't taken into account in making up the total or monthly receipts shown by exhibits Series I, J, Series K, and L; those are the actual receipts and include all the earnings of the theatres, which we received from the box office; in exhibits H-1 to H-7, both inclusive, these figures checked are the ones considered in the statement, Series I and K; those with an "X" are considered

(Testimony of Charles M. Tuckett.)

not in the statement; every thing is admissions to theatres except those marked "B. M. B.", I should imagine some are marked Alaska Film Exchange; those did not come from admissions to theatres; any deposits from the Petersburg, Sitka, Wrangell, Douglas, or Haines Theatres are designated so as to show from what they came; the only way a person can check the disbursements from these exhibits H-1 to H-7, both inclusive, against the statements, Series I and K, to know what disbursements I have included as expenses, is that I have checked those that we entered; the check marks are the ones we included in the statement, the X marks are the ones excluded; this item of \$2,075.60, receipts for the month of September, 1931, (shown in exhibit H-3) was a retabulation, defendant's figures were very bad—we had to retabulate everything; every time you see a blue X up here on the book you will have to correct it; that book entry of \$2,845.00 is incorrect and I used \$2,765.06; receipts for July, 1932, Juneau theatre, \$1,984.24 is the same total as with those marked "J"; this item \$80.00 (in defendant's exhibit H-3, under date of July 6, 1932) marked J. D. was for something else, doesn't have anything to do with the actual receipts of the theatres; I can't explain how anyone else could check these books; if I don't know it myself, I couldn't explain it to you; it is a thing you can't explain; you just have to know the system; the only way I could make these summaries, defendant's

(Testimony of Charles M. Tuckett.)

exhibit Series I and K, is from my memory, going through it at this time, all but the receipts, the receipts have been rechecked; the only thing I relied on my memory for was [502] anything that didn't check; I really could remember; that item of \$80.00 spoken of—the way I know it wasn't a receipt was we had all the papers on this data at the office; I don't remember every individual item of those five thousand numbers; I can't tell you but we did arrive at the figures of receipts; the receipts are the actual receipts from the theatres; the papers and data that we had were the income tax receipts, bank statements, if possible; I would have to look up to see if we have the bank statements now; I will produce what I can of them; we also had the income tax returns; I don't remember exactly what other papers we did have.

Redirect Examination.

Thereupon Witness Tuckett further testified: These three books, now produced, are the bank books of the Coliseum Theatre with The B. M. Behrends Bank, and The Miners & Merchant Bank, respectively.

Whereupon three bank books were offered in evidence, to which plaintiff objected on the ground they were incompetent, irrelevant, and immaterial, and not the true measure of damages, which objection was overruled, and to which ruling plaintiff then excepted.

(Testimony of Charles M. Tuckett.)

Whereupon said bank books were received in evidence and marked as follows: defendant's bank deposit book Behrends Bank, Juneau, from April 29, 1928 to October 6, 1932, defendant's exhibit U; defendant's bank deposit book Miners & Merchants Bank, Ketchikan, from January 2, 1931 to May 2, 1933, defendant's exhibit U-1; defendant's bank deposit book Behrend Bank, Juneau, from October 6, 1932, to August 14, 1933, defendant's exhibit U-2.

Whereupon Witness Tuckett further testified: Those are the only three books I could find with the business at the present time; this large bundle of papers contains all the bank statements and checks covering the entire period from 1929 to May, 1933, including defendant's personal business and also other business; by per- [503] sonal knowledge I could tell what these checks are; the checks are all here to back up the expenditures I have testified to, except one or two possibly which have been offered separately.

Whereupon the following proceedings were had:

Mr. HELLENTHAL: There is a great bundle of stuff, I don't like to encumber the record with; it would mean the introduction of probably thousands of exhibits unless we fastened them together in some way or other.

I don't know what to do with them. I will offer the whole batch in evidence as one exhibit, have them fastened together some way—put in a box or something.

(Testimony of Charles M. Tuckett.)

Mr. ROBERTSON: We would have liked to have an opportunity to check them over . . . We don't care to have them go in particularly, but I will make a formal objection at this time.

Mr. HELLENTHAL: I am perfectly willing counsel have them and check them over and am willing to let him do that after they are received in evidence. However this witness—(Tuckett) is probably the only person entirely familiar with the checks and what they belong to who can explain which is which, and this witness expects to leave Sunday on the "Northland" so I suggest counsel make an examination, and if he wishes to cross-examine about these checks to look them over as speedily as possible. This witness is expecting to leave for Portland on the "Northland". I make this statement in advance so counsel will know the situation. If counsel objects to the checks—did counsel make an objection?

Mr. ROBERTSON: Just a formal objection at this time.

Mr. HELLENTHAL: If counsel makes objection to their reception in evidence then I will turn the checks over to them. Let the record show they were offered and presented in court so counsel might examine this witness on them to determine whether his accounts are correct as he presented them.

Mr. ROBERTSON: Of course it would be humanly impossible for me or anyone to check

(Testimony of Charles M. Tuckett.)

them in a few moments—to bring them in just before I start the examination of Mr. Tuckett is of no benefit to us. I couldn't possibly check them at this time.

Mr. HELLENTHAL: Under the circumstances I will offer them in evidence.

Mr. ROBERTSON: I just make the same formal objection at this time, Your Honor. Of course, Your Honor, we feel we have been trying to get the records here for a period of more than two weeks, and now when Mr. Tuckett is anxious to get away, starting on the cross examination, is the first time we have ever had a chance to look at these particular records. It wasn't until yesterday afternoon that Mr. Tuckett finally admitted on the witness stand that they were even in existence. [504]

The COURT: Wouldn't it simplify matters if it can be understood between counsel that that bundle of checks which has been offered in evidence simply be left here for the use of counsel on both sides for examination without introducing them in evidence?

Mr. HELLENTHAL: I think that is the better way.

The COURT: And simply introduce such parts as you want to introduce as supporting or contradicting the record as already in.

Mr. ROBERTSON: That is all right. I don't want to preclude myself at this time by

(Testimony of Charles M. Tuckett.)

saying we could possibly get through cross-examining Mr. Tuckett on these checks today if that is gone into. But that is agreeable to me.

The COURT: Very well, the offer of these checks in evidence will be excluded with that understanding. They will be left here on the condition I just mentioned.

Mr. HELLENTHAL: Let the record show all the checks and bank statements have been turned over to counsel for the plaintiff for his examination and study and for such use as he may desire to make of them.

Mr. ROBERTSON: I don't want to be technical about the statement, but I understand they are left in the [505] custody of the court for either party to use.

The COURT: That is the understanding.

Mr. HELLENTHAL: That is all right.

Q. Here are a lot of other papers, Mr. Tuckett, purporting to be daily and monthly reports relating to those theatres. Look at that bundle and state what that is.

A. These are the daily reports and deposit slips from Ketchikan.

Q. What is the other bunch?

A. These are some of the weekly reports from both Ketchikan and Juneau.

Q. Covering portions of the period we are inquiring into?

A. Yes.

(Testimony of Charles M. Tuckett.)

Q. But not the entire portion?

A. No.

Q. Are these all the slips you could find?

Thereupon Witness Tuckett further testified: I think we found a few more slips last night after digging around but I can't tell for sure whether they are all here; there are hundreds of them; they cover only a portion of the time; everything figured in our work sheets, defendant's exhibits Series I, J, Series K, and L was taken from the check register books, defendant's exhibits H-1 to H-7, both inclusive, they are the only books from which I worked; they contain everything that these checks and other statements contain; the check register is the master book of all this stuff; its the book of original entry; we take all these reports and compile them as they come in each week in this book; they come in from the towns; we take the figures from the slips and enter them in the book; at the end of the month the check register is rechecked with the bank statement; the bank statement would have to correspond with the check book; the check register contains everything that is in the bank statements; all these things are carried on to my work sheets in so far as they pertain to the Juneau and Ketchikan theatres; this bundle of papers embodies all the checks, [506] reports, and stuff of that kind I could find; everything in defendant's office that has not been misplaced or destroyed; I made a thorough search; there is no ledger showing

(Testimony of Charles M. Tuckett.)

any transactions in connection with these two theatres; no ledger showing expenses paid out or receipts of the two theatres; they would all show in the check registers offered in evidence and there is no ledger having any bearing on it.

Whereupon bundle containing several thousand slips, checks, etc., was marked

DEFENDANT'S EXHIBIT X

for identification.

Thereupon Witness Tuckett testified: All the information shown on this bundle of checks and statements marked for identification defendant's exhibit X is shown in these check registers, defendant's exhibits H-1 to H-7, both inclusive; the daily or weekly reports show the number of admissions; these exhibits H-1 to H-7, both inclusive, don't show the daily admissions to each theatre; as a matter of fact they don't show all the information contained in these statements included in defendant's exhibit X for identification; they only show the deposits; in preparing these exhibits Series I and K, we checked back over some of these checks included in defendant's exhibit X for identification, but I really couldn't give you any idea of how many; I couldn't tell you how many checks there are in that bundle, but not less than one thousand; I couldn't tell you how many of those checks included in defendant's exhibit X for identification, I used in making out the work sheets, defendant's exhibits Series I and K; I knew about some but not all of these check

(Testimony of Charles M. Tuckett.)

vouchers all the time I was preparing those exhibits Series I and K; I don't know what percentage I had of them, I paid no attention to it; all I can say is I had some of them; I was not mistaken when I said yesterday that all these other records had been destroyed as soon as the Collector of Internal Revenue had accepted the income tax returns; these are just the bank records; the records I was referring to were daily records of the theatre deposits on the daily records, as I explained yesterday the manager might not deposit every day in the bank, he might take two or three days and make a deposit for those three days; that is the figure we base our things all on, the amount of money deposited in the bank; some of those statements in defendant's exhibit X for identification do include the number of people admitted; those books, defendant's exhibits H-1 to H-7, are check books, a register of the checks. The check distri- [508] bution of expense for May, 1929, defendant's exhibit H-2 is \$3,704.40, which is the amount of checks paid out for that month; this figure at the bottom of that page is the amount of checks that was paid, where I say "Paid out, month of May, 1929, \$3,704.40;" I really don't know whether that is the same as the total of the checks listed in the book for the month of May, 1929, I paid no attention to it, that is defendant's tabulation; the only thing I did is to check it with the bank statement, which shows \$3,704.40 paid; I know that book is correct with all the checks paid, but I

(Testimony of Charles M. Tuckett.)

don't really know whether that book is correct or incorrect.

For October, 1929, defendant's exhibit H-2 shows paid out for that month \$6,825.10; I presume that the actual total, for that month, of the checks shown there with the outstanding checks, would be \$7,092.97; I mean that the amounts marked as "paid out" in that book are only the amounts of the checks returned at that time, that is my explanation of the difference between that amount and the amount of the added checks; the "amount paid out" doesn't signify the amount of checks drawn in the book; neither \$6,825.10 nor \$7,092.97 represents the amount paid for expenses of the Juneau Coliseum Theatre for October, 1929.

On defendant's exhibit "K-1" I reported as expenses of that theatre for that month, not the \$6000 or \$7000 item, but \$4,020.55, and the difference between that amount and those other two amounts is entirely a matter of elimination based entirely upon my personal knowledge of what should be eliminated except for the film checks, as this \$4,020.55 was the film rental coming out of the Alaska Film Exchange; I haven't seen those books, defendant's exhibits H-1 to H-7, both inclusive, since I left defendant's employ over a year ago; I wouldn't have to go back and check each check in order to see whether or not that \$3,000.00 would be included, because I know from long years of experience what the [509] actual

(Testimony of Charles M. Tuckett.)

theatre expenses can be; there is only certain things you can use or put in a theatre, only certain expenses to a theatre that can occur; I based these summarized work sheets (defendant's exhibits Series I and K) on the fact that I know what can occur in theatres and not on the specific items as incurred; but, if it didn't look as though it belonged to the theatre, I looked it up in the checks I mentioned; if it belonged we put it in, if not, we excluded it; Witness Stabler and myself looked it up; I didn't draw all those checks; if we had an individual item about which there was any doubt, we looked it up; if there was any doubt about it we excluded it; I couldn't give a single item where I excluded any doubtful item; I couldn't remember a single one; nobody does when they are working; I really don't know whether in my summaries, Series I and K, I put in only those I checkmarked with a lead pencil on those books; it was just to help you that I told books defendant's exhibits H-1 to H-7 where there are neither checks nor cross marks.

This form at the top of the page where it is ruled off like a ledger or journal form for the month of January, 1929 in defendant's exhibit H-5 is intended to show the distribution of the checks as to the various kinds of expenses; the total shown there for January, 1929, is \$2,330.61 which is correct; I guess that the total adding those columns across is

(Testimony of Charles M. Tuckett.)

\$2,450.45, the difference is taken up by outstanding checks but there is nothing in that book that allows for the outstanding checks; the figure \$2,330.61 will correspond to the bank statement of the checks the bank paid; those columns don't actually add up to the amount of checks actually paid out but the next month will take care of some of those checks; defendant carried no record of outstanding checks.

The total shown as paid out for February, 1929, in defendant's exhibit H-5 is \$3,412.93; I didn't add the checks actually drawn that month but I guess they amount to \$4,445.13; I couldn't [510] tell you the total check distribution shown for that month of expenses; it isn't marked down there, that is the amount of checks paid by the bank only; these pages, sort of lined off like in columns, are intended to cover the distribution of expenses for the particular month in question, but, as I explained before, the Juneau Coliseum book here covers lots more than the Coliseum theatre alone; I have to segregate the theatre expenses; the total of the expenses shown as distributed there is not the same as the total [511] shown at the foot of the page as paid out; that distribution is nothing more than defendant's deductions when he makes up his income tax return; it is for his convenience only; we used it as a basis for his income tax; it had nothing to do with the theatre, only for defendant so he could understand how he paid his money out; included in that distribution is Juneau Dairy \$6.50, Butler Mauro, San

(Testimony of Charles M. Tuckett.)

Francisco Bakery—we know that cannot be for the theatre; the reason the amount of expense distribution does not equal the same as the total checks drawn is that defendant had a habit of giving his checks from the first to the last of the month; there was always an enormous amount of outstanding checks but he never considered them at all; the total amount of expense distribution didn't equal the total amount of checks he drew for the month because the money paid out was nothing more than the total amount of checks that went to the bank; defendant drew plenty of checks but they were outstanding, couldn't have arrived at a balance; that expense distribution was made at the end of the month and he didn't include his outstanding checks; he included them in the month he drew the check; we got the bank statement around the first of the month.

In defendant's exhibit K-1 I used as expenses, \$2,046.36, and there could be a differential of around \$2,500.00 from the total amount of the checks drawn, and a differential of around \$1,400.00 from the amount on that very page shown as the amount paid out, also a difference of about \$1,430.00 from the total of that expense distribution amounts to; I have a check right here for \$1,130.00 for plaintiff that isn't included in my statement, that accounts for a lot of it; I didn't check each one of those items during that month when making up my work sheets, defendant's exhibits K and K-1, because I knew

(Testimony of Charles M. Tuckett.)

Electrical Research Products was capital investment; didn't have to look at the check because I knew the amount; I knew the amount of the Juneau Bakery is defendant's; I know that George Getchell was hauling stuff from his home; I knew [512] at this time it was defendant's, it wasn't the theatre because Getchell couldn't do anything for the theatre.

The total footing below expense distribution for March, 1929, shown on defendant's exhibit H-5 is \$5,289.61, I don't think that is the same amount as the total of the checks shown there as being drawn in March, 1929; that also is different from the total of the columns shown as covering expense distribution for March, 1929, and is different from the amount I reported in defendant's exhibit K-1 where I used \$2,353.69 instead of \$5,289.61; I personally checked out all the items constituting that difference for March, 1929, the same way I did the other, by actual knowledge of what they were for based upon my personal knowledge.

Defendant also had rents coming in during this time most of which he deposited in the Alaska Film Exchange, but he did deposit rents in the Behrends Bank account for the Coliseum Theatre but there is nothing in those books, defendant's exhibits H-1 to H-7, inclusive, to indicate that; when we made the final deposit of rent we had the rent record; defendant got in no rents from the Ketchikan Coliseum Theatre; there was a small store located in the

(Testimony of Charles M. Tuckett.)

Coliseum Ketchikan Building, but defendant allowed his men to use that as petty cash by which I mean to buy whatever small items they wanted around the theatre, but there was no record kept of it; he didn't demand an accounting of it;

I made out defendant's income tax returns and he returned \$600.00 rent from Ketchikan; there might be some of it included in receipts of the Ketchikan Coliseum Theatre but I don't know how much.

The amount of checks paid for April, 1929, for the Juneau Theatre was \$6,786.96; I don't know the amount of checks drawn or whether the amount of checks drawn was \$6,323.41; I haven't added the various items of expense distribution for that month to see whether it actually amounts to \$6,413.06; I reported the expense on defendant's exhibit K-1 for that month as \$2,125.52; all of defendant's Juneau theatre receipts were put into that account; out [513] of which he paid all expenses of every kind, personal and otherwise, and rents and money he borrowed was put into that account.

Assuming that the amount of the various checks in April, 1929, in defendant's exhibit K-1, is \$917.40, I explain that I reported expenses of \$2,125.52 for that month in defendant's exhibit K-1, because that is the actual cost that I got from the checks here as I segregated the checks that is all the checks amounted to; I didn't check the figures up to the amount of \$2,125.52 because \$948.50 was for film

(Testimony of Charles M. Tuckett.)

that came out of the Film Exchange book; the reason I didn't check them all was it looks as though I did checkmark them here, I checked some; I am not infallible, I might have missed some, I don't claim I checked every one of them; we worked on it continuously and I am not infallible but so far as I looked it over, the different check books are all marked.

In each of these books, defendant's exhibits H-1 to H-7, both inclusive, the various expense distributions for the several months, within the particular portions of those books that have been described as ruled off, in the sense of little columns or like ledger pages, are not what I used when I prepared defendant's income tax return; the only amounts I used were individual check entries; I disregarded this distribution completely; that is the receipts for the month of April; the distribution was made for defendant's own arrangements, I disregarded it completely; I don't know whether it is correct or incorrect; I didn't even consider it.

While on defendant's exhibit "K", I reported the total expenses for the year 1929 for the Juneau Theatre is \$34,183.92, it is true that when I made defendant's income tax return for that year I reported the expenses for the Juneau Coliseum Theatre as \$52,545.72, which was afterwards corrected to show the expenses of that theatre for that year to be \$43,672.54—I think that is the figure, I don't recall exactly. [514]

(Testimony of Charles M. Tuckett.)

I reported in defendant's exhibit K-2 expenses of the Coliseum Theatre, Juneau for 1930 as being \$35,425.90; I also made defendant's income tax return for 1930; it might be that on defendant's income tax return I reported expenses of the Juneau Coliseum Theatre for that year as \$55,625.25; the figures check with the income tax.

I also made out defendant's income tax return for 1931, I can't remember what amount I reported as expenses for the Juneau Coliseum Theatre for that year, I would have to look at the old tax returns.

I was in Ketchikan during the installation of plaintiff's original talkie equipment in 1929; I can't say how long I stayed there, a year more or less, after looking at the check book I would say that I went there the last part of May or some time in May, 1929, and returned to Juneau in September, 1929; I was again in Ketchikan in May, 1930, and remained there some eighteen or nineteen months, but I made trips to Juneau quite regularly; I can't recall how many trips I made to Juneau but it wasn't once a month, could have been once in three months, might have been once in six months, but am unable to state which.

The expense distribution for the Ketchikan Theatre for April, 1930, shown in exhibit H-6 is \$6,293.43; I don't know how much the checks actually drawn amounted to that month: I haven't added up the amount that is given there as having been

(Testimony of Charles M. Tuckett.)

disbursed under that segregation or distribution of expense; I repeat that we disregarded that, didn't pay any attention to it or into consideration when making these statements; that is defendant's own personal distribution of how he could tell what it is; he wanted it and he had it; it showed expenses of operating of the Coliseum theatre and how the checks were segregated so he could tell offhand any way he wanted, how much he spent for wages, film exchange, repairs, how much they were at the time being, that covers nearly everything in the book, all his miscellaneous expenses of operating [515] the theatres are included in that segregation or distribution of expenses, but there is omissions—one \$688.01 omitted, classified as improvement, but omitted from this distribution of defendant; I said I didn't see the figure here, I'll check it; it must be excluded.

For April, 1930, I reported the expenses of Ketchikan Coliseum Theatre in defendant's exhibit I-1 as \$1,014.48; the expense distribution for April, 1930 in defendant's exhibit H-6 is in my own handwriting; these expense distributions in defendant's exhibit H-1 to H-7 were for defendant's own personal use; it wasn't considered in making any dealings, either with making up income tax or this statement: I made some of them, Gross made some of them.

Thereupon the following proceedings took place:

“Q. Look at Exhibit ‘I’, will you please?

A. Yes.

(Testimony of Charles M. Tuckett.)

Q. You reported for the calendar year 1929, Coliseum Theatre at Ketchikan, total expenses of \$38,917.53?

A. That is right.

Q. In Mr. Gross' income tax return you made out for that year you reported expenses for the Ketchikan Coliseum Theatre of \$52,-120.37, is that correct?

A. Not for Ketchikan, I don't think.

Q. Can you refresh your memory from the income tax return?

A. I made it—seems awful high for that.

Q. I will ask you this afternoon to bring those up.

A. O. K.

Q. Looking at defendant's exhibit "I-1" again, Mr. Tuckett, didn't you return the expenses for the Ketchikan theatre there as \$23,880.53?

A. Yes.

Q. And in making out the income tax return for Mr. Gross for the calendar year 1930 didn't you return the expenses of The Coliseum Ketchikan theatre there for that year as \$52,-285.20?

A. I don't think so; I will have to refresh my memory on that; it seems high.

Q. Will you please bring up all those income tax returns so you can refresh your memory on that, after lunch?

A. Yes sir." [516]

(Testimony of Charles M. Tuckett.)

Whereupon Witness Tuckett further testified: I think defendant's attorneys have this bulletin book that I spoke of as having obtained from ERPI or some of its people relative as to how to operate or handle its talkie equipment; I have one just like it in Portland; I bought Richardson's book on that subject; defendant has no books about the operation of sound reproducing equipment that I know of; I have no idea of the total number of checks drawn and recorded in defendant's exhibits H-2 and H-5; in preparing defendant's exhibits Series "K" I used in all about fifteen of those checks; I don't know how many, about fifteen or ten a month; in April I used twelve out of fifty-four checks; in September, 1929, I used fifteen out of sixty-four checks; computing the cost and excluded the remaining forty-nine; these defendant's exhibits Series I and K were based upon items that I checked out from these books as representing costs; defendant never kept a ledger; out of the Ketchikan check books, defendant's exhibits H-6 and H-7, other than payments relative to the operations of the Ketchikan Theatre, payments were also made to plaintiff on the contracts, some of the film checks were paid there, either to the people from whom he bought films or to the Alaska Film Exchange; the Behrend Bank was paid some money, loans to the Miners & Merchants Bank; \$500.00 was drawn out that was used to build at Sitka; an item of \$243.00 for a Frigidaire went into the apartment house at Juneau or Petersburg; the City of Sitka taxes on the Sitka theatre were

(Testimony of Charles M. Tuckett.)

paid out of the Ketchikan account; \$71.11 was paid to Mrs. McLean on account of property; I know of nothing else; neither of defendant's exhibits Series I or K set forth either separately or as a total the various amounts that are set forth in defendant's exhibits H-1 to H-7, both inclusive, as expense distribution tabulations; we picked [517] out the exact expenditures from these books, defendant's exhibits H-1 to H-7, both inclusive, and tabulated them, picked them item by item, but didn't set forth the totals of those tabulations as they appear in those books, defendant's exhibits H-1 to H-7, both inclusive.

Whereupon the following proceedings occurred:

“Q. I now ask you to please refresh your memory as to what the total expenses were reported in Mr. Gross' income tax for the calendar year of 1931 in respect to the Juneau Coliseum Theatre? [518]

A. I will have to get them.

Q. That is for the calendar year 1931 Mr. Tuckett, the Juneau Coliseum Theatre.

Mr. FAULKNER: If the court please, I want to interpose an objection to that question as not proper cross examination and not a proper question. The question would be not the income tax as reported by him but the income tax as paid or accepted or finally settled between the payer and the Collector of Internal Revenue. He asked what income tax was reported.

(Testimony of Charles M. Tuckett.)

Mr. ROBERTSON: No, I asked what expenses he reported in that income tax return for 1931 for Juneau theatre.

Mr. FAULKNER: It is the same thing as shown by the income tax report.

The WITNESS: I can't answer that without an explanation of this income tax.

Q. Isn't the amount stated there?

A. Yes, that is true, but there must be an explanation of the account the way the tax is figured.

Q. I am not asking for an explanation. I am asking for the amount you reported for expenses for the Juneau Coliseum theatre for 1931.

A. That is why I want to explain about the matter.

Q. I ask that the witness be directed to answer the question.

The COURT: The witness is entitled to answer in his own way.

Mr. ROBERTSON: But the question is how much was the amount he reported. I am just interested in the amount reported, at this time.

The COURT: I think the objection is well taken. It will be sustained under the circumstances.

Mr. ROBERTSON: If the court please, we take an exception to that.

The COURT: Allowed.

(Testimony of Charles M. Tuckett.)

Mr. ROBERTSON: We think it would test the credibility of the witness.

Mr. FAULKNER: We have no objection to putting in the figures, but I don't think that is the way to get at it. I don't think it is a fair question.

Q. Now, Mr. Tuckett, I ask you what amount you reported as expenses of the Ketchikan Coliseum theatre for the calendar year 1931? [519]

Mr. FAULKNER: I make the same objection to that question, incompetent, irrelevant and immaterial and not cross examination?

The COURT: Sustained.

Mr. ROBERTSON: Exception, Your Honor.

Q. I now ask you, Mr. Tuckett, what expenses you reported in your income tax return for the calendar year 1932 as the operation of the Juneau Coliseum theatre?

Mr. HELLENTHAL: We have no objection to counsel asking about these income tax reports, provided the witness be permitted to do what I tried to get him to do. I offered these in evidence. Counsel objected, and the Court sustained the objection, but counsel having objected and they being excluded, I now insist they be placed in evidence and the witness be permitted to explain the whole thing,—all put before the jury and the witness given a chance to explain them.

(Testimony of Charles M. Tuckett.)

Mr. ROBERTSON: If the Court please, I objected, as I stated at the time in the formal objection, on the theory that the first and third counter-claims are not the true measure of damages.

The COURT: The Court again rules the witness is entitled to answer in his own way.

Mr. ROBERTSON: Take an exception, Your Honor.

Q. I now ask you to state what amount you reported in Mr. Gross' income tax return for the calendar year of 1932 as the expenses of the Ketchikan Coliseum theatre.

Mr. HELLENTHAL: We are willing that question should go under the ruling of the court that he can explain it and answer in his own way.

The COURT: Provided, of course, it is responsive to the question.

Mr. ROBERTSON: I respectfully urge, Your Honor, that the answer to the question is the amount he reported, that his explanation may be given on redirect examination.

The COURT: That is the ruling of the court.

Mr. ROBERTSON: Take an exception."

Thereupon Witness Tuckett further testified: I am unable to state the respective amounts that I reported as respective expenses of the Juneau Coliseum Theatre and the Ketchikan Coliseum Theatre

(Testimony of Charles M. Tuckett.)

for the years 1931 and 1932, respectively, without refreshing my memory from those reports of which I have in my hand correct copies.

Item in defendant's exhibit H-2, under May 1, 1929, Thomas Hardware \$79.75 was for material for the Gross Apartments; I don't [520] remember the last time I saw that bill; item on May 1, 1929, Thomas Hardware, \$120.05 was for the same thing; I know that because we couldn't put that much material into the theatre; we had no place for it; item of May 1, 1929, National Theatre Supply Company, \$165.33, is for repairs to machines in the Coliseum Theatre, as indicated by a cross mark in front and a check in the rear; we put down \$6.25 of the amount to the Coliseum Theatre, the balance was for other parts for other theatres; I didn't have the bill of it when I was making that statement; the way I knew after a period of almost six years that only \$6.25 of that was to be charged to the Coliseum Theatre was in going over our records of theatre expenses, we found that was the amount; we don't have any more records of expenses; we had the old bill and cancelled check; I must have looked at the bill to get it; I was never asked to bring any of those bills in evidence; a bill is not a record if you have a record of the payment of it: the \$1,500.00 of August 1, 1929, on the Behrend Bank was for the big sign outside the theatre, which was excluded because it was figured in capital investment, but was included in my statement of depreciation; I can't say whether I listed

(Testimony of Charles M. Tuckett.)

in on that statement when I figured up that depreciation; it is in the general tabulation of furnishings and fixtures; I considered that a capital expenditure in defendant's income tax return; item of June 1, 1929, Jack's Transfer, \$58.50, was for hauling stuff for defendant to one of his places, I really don't know whether to the Gross Apartments or up to his house, but I know it wasn't to the theatre; I didn't have a bill when I eliminated that the other day; I personally remember it because of my agreement with him; item of May 1, 1929, Steve Stanworth \$1.75 was for a tap on the wash bowl in the men's room in the theatre; I think it was included; I am not infallible; you can't hold me to each individual one; I see the item of \$507.62, August 7, 1929, City of Juneau taxes—it has a check mark opposite it; the item [521] of October 7, 1929, City of Juneau Taxes, \$683.10, has a cross mark in front of it and was included because we figured the tax on a yearly basis and put it in, paying taxes twice a year; that included everything; it was part payment on defendant's property in Juneau; I believe part of it was allocated to expenses of the Coliseum Theatre; we allotted one-twelfth of that, which was \$63.00 a month; that is why the item of \$683.10 has the cross mark in front of it; item December 15, 1929, Charles Tuckett, \$112.50, was eliminated because we only tabulated half of my salary; I was doing other work for Gross; my total salary was \$225.00; I got \$250.00 a month just after that but I don't know for how long.

(Testimony of Charles M. Tuckett.)

I eliminated the item February 1, 1930, Ketchikan \$70.54 from the tabulation, defendant's exhibit Series K, which was used for paying Mr. Gross' small bills; I have no idea of what they were for; item of \$105.00 J. B. Burford July 1, 1930, was eliminated from exhibit Series K; I really don't know what that item was for; the items of March 1, 1930, City of Juneau taxes \$683.10 and October 1, 1930, Juneau taxes \$728.10 were both excluded because we made an allowance of \$63.00 for each of twelve months; the item of April 16, 1930, Charles Tuckett, was excluded as one-half my pay charged against Gross' other theatre; I don't remember when my salary of \$250.00 a month commenced; item of October 15, 1929, John Davako \$70.00 was eliminated from Exhibit Series "K" because he was a porter in other places for defendant, so only half of his salary was charged to the Coliseum Theatre; two items, November 16, 1929, John Davako, \$20.00 and \$50.00 were both eliminated because that was one-half of his salary; he was janitor; he was never paid \$140.00 a month for work in the theatre; I don't remember if he was ever paid more than \$140.00 a month; item of November 1, 1929, Allen Shattuck, Inc. of \$102.00 was not checked up when eliminated from exhibit K; I didn't have to because I knew that insurance wasn't for the theatre because we carried only very little with [522] him for the theatre, which is the basis of my reason for excluding it; in defendant's exhibit H-6 the item of

(Testimony of Charles M. Tuckett.)

August 1, 1929, Gould and Gould, insurance, \$400.00, that was eliminated; that was for insurance; that was for a sort of general insurance for the circuit which was later cancelled; it wasn't fully completed; part of the money was paid out in the first place; it wasn't expense for the Ketchikan Coliseum Theatre, not that I know of; I don't remember all the details of it; we did have a record of those items of insurance for the theatre building but I don't know where they are, I haven't seen them since I came back; I don't know where he kept them: I couldn't say whether he kept them in a journal or ledger; the item of August 1, 1929, for the Behrend Bank \$1,599.02, that was eliminated; it was for film used in Juneau, Ketchikan, and on the circuit; under Alaska Film Exchange or under film rentals I took all the film rentals allotted in the proper proportions under film rentals and I included the item of \$1,559.02 in order to reach the total amount of what they cost; it was included when I went through the Alaska Film Exchange book; the item of October 2, 1929, Fox Film Company, \$1,785.00, of which \$892.50 was allocated to the cost of the Ketchikan Theatre, and the balance to Juneau, because the first Fox film and the first few of Warner Brothers were bought for the two towns and not put on the circuit.

I was in Ketchikan in July, 1929, I wasn't there in May, 1930; I wasn't in Ketchikan during April and March, 1930; the item of April 3, 1930, Marine

(Testimony of Charles M. Tuckett.)

Paint Company for \$347.72, was excluded from the cost because it was paint for one of Gross' circuit houses at Wrangell, I think either Wrangell or Haines; I know it because approximately at the time he had to worry about getting all this dough in here; I was in Ketchikan at the time but drew the check from Juneau; item of April 10, 1930, Coliseum Theatre \$10.42 was also for Wrangell, plumbing and heating; the item of March 28, 1930, Haywood Wakefield \$574.00 was for seats for Wrangell; I know that by recollection at this time; I didn't look up the bills or anything in making out this statement; as late as November, 1930, [523] Steve Sarakoff's salary as janitor at the Ketchikan Theatre was only \$130.00 a month; I don't know when it was that defendant paid him \$175.00 or \$185.00 a month.

I don't remember where I got the information as to the actual cost of the Ketchikan Theatre; I have the work sheets, Clauson and I made up work sheets, he made some of them and I made others; I kept those work sheets, they are in my papers in Portland. the work sheets of defendant's theatres in Alaska belong to me, they were mine and I took them with me to Portland, but I didn't bring them back here for this trial. I wasn't told to; I knew that I was coming here as a witness for defendant in these suits; I have an impression, I haven't exact figures, the actual cost of the Ketchikan Theatre was around \$90,000.00, including land, building, and

(Testimony of Charles M. Tuckett.)

furnishings up to \$1929; the only improvements defendant put in that theater after 1929 was the Western Electric Sound Equipment and the organ, which latter cost \$11,000.00 but is included in the \$90,000.00; the only insurance carried on that building and equipment of which I ever knew was \$1,000.00; I don't remember what that property was assessed for for taxation purposes by the Town of Ketchikan; in defendant's exhibit Series 1 we pro-rated the Ketchikan taxes at the rate of one-twelfth each month.

I don't know the actual cost of the Juneau Coliseum Theatre or what the land cost; the only thing I know is the valuation arrived at as near as we could by Clauson, that is the only figure I know of, we had no figures to compile on that, it is just an estimate; I think defendant redecorated the Juneau Coliseum Theatre after plaintiff's talkie equipment was installed there in May 1929, but I don't know how much it cost, very small, around \$1,000.00 I imagine; I really don't know whether that is included in defendant's exhibit Series K as an improvement or as a repair, I would have to look it up, I have forgotten that matter; I am unable to say now. [524]

On defendant's exhibits Series I and K by net profits, I mean the difference after deducting the expenses I show on these exhibits, from the receipts I show on these exhibits, and I mean by net losses the amount that the expenses, as shown on these

(Testimony of Charles M. Tuckett.)

statements, exceeds the receipts as shown on these statements; the summarized statements on these exhibits are a compilation from the figures shown on these exhibits made in cooperation with Witness Stabler; he did the tabulating and I called the numbers on these sheets: I can't swear that the addition is correct.

I think the cuts in salaries of the various employees in the Ketchikan and Juneau Theatres were made some months after plaintiff's equipment was removed, but I don't know whether one, two, three, four, or six months later; defendant tried to decrease expenses at the time salaries were cut: the expenses fluctuated proportionately to receipts: our biggest cost was film rental and it takes some time to get reductions in film rental; I think the first big reductions in film rentals obtained by defendant in those two theatres, after the talkie equipment was installed in them, was in the fall of 1931; films have no stable value, it is a matter of what you can bid for them: they were raised again in the spring of 1931, raised in the summer, and reduced in the fall; we started for reductions on film the first few months after plaintiff's equipment was installed in those two theatres.

Defendant acted as general manager of his Juneau and Coliseum Theatres; the only allowance or payment made to him for his services or charged against the operation of either of those theatres as salary for him was just his little bills he paid here in

(Testimony of Charles M. Tuckett.)

Juneau for his house; he would draw checks once in a while for cash and then if he travelled any it was usually paid by the Alaska Film Exchange or whichever theatre he happened to have checks on; it might be paid indiscriminately out of either the Juneau or Ketchikan Theatre: the only allowance made to defendant on account [525] of his services were his living expenses; that is the only money he received; they were not credited or deposited as part of the payment upon his services any way, the only credit he took was, when he made up his income tax report, all his personal expenses were charged to him and that was the only record made of what he received: I did that every year I made up his income tax return; in preparing these statements of costs, defendant's exhibits Series I and K, I made no charge at all and gave no such credit on the cost, leaving them out entirely.

I think there were one or two months that the Juneau Coliseum Theatre expenses were greater than the receipts prior to the time that plaintiff's talking equipment was removed from it, but I can't remember when that was; I think the April, 1931, receipts of the Juneau Coliseum Theatre were a little higher than those of February, 1931, April 20, 1931, being the date on which plaintiff's talking equipment was replevined from the Juneau Coliseum Theatre; defendant's exhibit K-3 shows receipts of the Juneau Coliseum Theatre for April, 1931, were \$3,042.83, and loss \$243.03; the receipts

(Testimony of Charles M. Tuckett.)

for that theatre for February, 1931 were \$3,078.68, expenses \$4,498.26 and loss \$1,419.58, the loss for February, 1931, being greater than for April, 1931; plaintiff's talkie equipment was operated in the Juneau Coliseum Theatre throughout February, 1931.

I think receipts of the Ketchikan Theatre had taken some drops before plaintiff's equipment was removed from it, they took a drop with the season, the season had a little effect on it; I don't think anything else had any effect on it, just the season of the year which is controlled by the fishing season; the best season of the year for the moving picture business was the summer months and early fall by which I mean June, July, August, September and October; I am not saying for any particular year as I don't remember but it has always been my idea that the summer months in Ketchikan were the best months, summer and early fall; so far as [526] Juneau is concerned the show business is very stable, very uniform, not much fluctuation, the fluctuations being caused mostly by the pictures, the weather had a little bit to do with it for a few days, but that was small; I don't remember whether the receipts of the Ketchikan Coliseum Theatre took a decided drop during 1929; I would have to look it up; defendant's exhibit I shows that for December, 1929, the Ketchikan Coliseum Theatre receipts were \$4,314.20 and expenses \$2,497.11; the highest we ever had in that theatre was August, 1929, receipts

(Testimony of Charles M. Tuckett.)

\$7,519.70, the talkie equipment being there throughout that month and in December, 1929, the receipts of that theatre dropped to \$4,314.20; we had no comparatively high month in the Ketchikan Coliseum Theatre then until late summer, September, 1930, when the receipts were \$5,625.75 which was the biggest monthly receipts for the Ketchikan Theatre for 1930. The receipts of that theatre after September, 1930, took no more of a drop in proportion than a year before, the receipts for the Ketchikan Theatre for November, 1930, being \$3,741.25 and for December, 1930, \$2,813.50, a drop as compared to September, 1930, in round numbers of \$2,800.00; the receipts of the Ketchikan Coliseum Theatre for April, 1931, were \$2,987.15, and for February, 1931, exhibit I-2 were \$3,059.05 or \$174.00 higher than for that same theatre for December, 1930; I don't know what caused the big drop in receipts for the Ketchikan Theatre for December, 1930; the Juneau Coliseum Theatre never had a month with as high receipts as the highest month in Ketchikan; the Juneau Theatre's receipts for January, 1930, were \$4,633.35, February, 1930, \$3,757.91, a decrease of a little over \$800.00, in March, 1930, \$3,674.55, or a drop of a little less than \$1,000.00 as compared to January, 1930, in that theatre; receipts in that theatre were down again during the months of May, June, July and August, 1930, and they didn't go up again to any large extent until December, 1930; in January, 1931, they were \$3,347.41 and for De-

(Testimony of Charles M. Tuckett.)

ember, 1930, \$5,517.55, making a decrease in round num- [527] bers of about \$2,100.00; it is true that both receipts and expenses of the Juneau Coliseum Theatre were very high for some of the months during which plaintiff's equipment was in it, and it is also true that during some of the months the receipts were comparatively low and the expenses remained high, and it is also true that sometimes the receipts were quite high and the expenses were low during that period; in other words, the receipts and expenses didn't necessarily fluctuate proportionately with each other; I would say that the expenses of the Ketchikan Theatre didn't fluctuate very much, well they dropped down to \$1,600.00 and were up to \$2,800.00, which fluctuation didn't necessarily depend on the amount of receipts taken in by the theatre for that particular month.

The Capitol Theatre started up in Juneau on January 15, 1931; the repairs that I made to plaintiff's talking equipment in the Juneau Theatre were I supervised the making of repairs to the pilot light, which I wired Seattle for in January; it was under my supervision; Ned Lemieux actually made the repairs; the other repairs I made was the freeze up of the drive and a little bit later during Foulon's time, I don't remember the exact date, the operator called from the booth and said the machine wouldn't go so we sort of tested out the drive to see about the trouble and found out it was in this drive, I think in the 709-A drive; I and

(Testimony of Charles M. Tuckett.)

my helper and helper operator Zolman Gross actually made whatever correction or repair was necessary when this freeze-up occurred; there was only one more repair made, the exact date I don't quite remember, which was in the photo electric cell line—Mr. Lemieux made that repair, the engineer had been around and shortened up the wire from the photo electric cell to the pre-amplifier and got it too tight or soldered the connection so it was too tight, and caused a crackling noise whenever the machine was running and get warm and start a crackling noise, which occurred I think, a little after January, 1930; I think it was after my pilot light repair; I made just one repair in the Ketchikan Theatre, just [528] after the opening, a broken wire going up to one of the tubes, Mr. Taylor being either on the boat or in Juneau, I don't know where he was, but he was in Alaska at that time; I helped Taylor install the talkie equipment when it was installed in Juneau, the particular aid I gave him was: I unpacked it in Juneau here and Louis Lemieux and myself unpacked all of the different parts, such as the pre-amplifier, fly-wheel, movie-tone, and cabinet there; we did all the unpacking of it, set up the foundation for the base and helped him line up the motor and even to put in the main fly-wheel and also connect the different drive shafts; I soldered all the connections at the back of the main panel; I was generally helping Taylor, giving him the several parts, helping him put them to-

(Testimony of Charles M. Tuckett.)

gether, running the machine when he was testing it, helping him set the horns; he supervised it and told us what to do and we did the work; he told us what to do; I couldn't say whether Lemieux did anything else in connection with the installation of the equipment in the Juneau Theatre; I was present at the time but we were not instructed in the working of the different parts of the equipment; when the talkie equipment was being installed in Ketchikan I went from Juneau to Ketchikan with Mr. Taylor and the particular work I did there in respect to helping him was the same exactly as in Juneau, only I did it by myself, helping him unpack, soldering the connections at the back of the rack on the photograph, plaintiff's exhibit 15; that is all the work I did there, just helped him along; one time I fixed the hum I found in the Juneau machine; we found it was AC and we knew it was in our own equipment and traced it down to a short circuit; I don't remember having any such trouble in the Ketchikan Theatre and I don't think I ever fixed any down there.

In fixing the hum in the Juneau Theatre I used for framing my pilot light on the front, which had been shorted against the machine; every week I always checked with a hydrometer the A battery which was a wet cell, to see that the connections were tight [529] and that they were clean, and the operators kept them charged up and the chart kept, and I looked into them to see that there was plenty

(Testimony of Charles M. Tuckett.)

of water in them; I don't remember finding any loose connections in those batteries during that time; I would try the wire, if it was loose I would tighten it; that was the only means I used of checking loose connections; it was just an inspection of what my operators were doing, of whom we had several, at one time Billy Burke, Duncan Sinclair, Ralph Bontrager, Homer McLean, and another time Zolmain Gross; I didn't defer to their opinions as to their knowledge being better than mine with respect to the equipment; I just went over it and saw that they did their work, is all.

Sometimes I was in Juneau when a service engineer called and sometimes I was in Ketchikan; at the start I spent all the time I could with him when he called because I was interested in the machines; all the time he was in the theatre; any time that Taylor was there I spent with him and I was with Witness Knowlton the greatest part of the time he was there; I don't think I spent much time with Albright, I didn't know him very well, or with Tobey; I never met Little, I only met Hurlburt once; I spent two or three hours, I presume, with Foulon when he made his trips here for inspection and service; I didn't spend, with him on each occasion, the entire time that he devoted to going over the entire equipment, but I did on one or two occasions; I spent pretty nearly all the time with Knowlton when he was here; I spent some time with Witness Lawrence, but couldn't say how much, but

(Testimony of Charles M. Tuckett.)

not every time he was here; I couldn't state the amount of time I spent with him on any particular occasion as he was around the theatre quite a bit; we were friendly and he spent most of his time around the theatre; he tested the line voltage to the horns; I don't recall which equipment; we made the test once in a while, we had a meter tester there, measured the line voltage, as we had three amperes at the horns, with a regular meter plaintiff supplied; I sent out the reproducer in Juneau one time for repairs; that is the only thing in parts [530] for repairs that I remember sending out; I had a spare reproducer; it was sent to Seattle for repair and overhauling to plaintiff; I don't remember why the service engineer recommended a change in the apertures in this equipment; they recommended a new lense system as they told us it would give us a higher cycle but I don't recall their having recommended a change in the apertures; in those bills is one for a 555-W receiver, the receiver on the horn: I couldn't say for sure what it is; it was sent in from Ketchikan for repairs; I don't know why it was necessary to do so but believe Louis Lemieux sent it to plaintiff in Seattle; I don't have any personal knowledge as to what was the matter with it or as to why it was sent for repairs; I would be able to tell whether or not an aperture or receiver was defective if it caused any trouble; I never had any trouble with a receiver furnished by plaintiff.

(Testimony of Charles M. Tuckett.)

When the fuse blew in the batteries in the charging panel, that put one of the machine amplifiers out of business and there was no power in the disc—the film side or the disc, I don't remember which, but the opposite machine was running, the machines being set up in pairs and the paired machine was still running; only one machine was crippled to the extent that you couldn't use the disc on the left side; you couldn't get any sound as it would blow out the fuse; this particular trouble that affected only one of the amplifiers, affected disc reproduction because it would blow the fuse out from the battery room; whenever we would throw that switch on the disc side, it would blow out the fuse.

Mr. Gross went East in September, 1929, and got back the fore part of February, 1930, and was gone all that period, returning on February 10, 1930, at which time I called his attention to this trouble that I spoke about a minute ago; during his absence I was more or less general manager or supervisor of the Ketchikan Theatre from Juneau and I had charge of his entire business; the Ketchikan manager, during Gross' absence, being really [531] subject to my orders.

The other trouble I called to defendant's attention when he returned early in February, 1930, was about the tubes, which seemed to be a constant trouble; I had had no specific trouble of that kind shortly before his return, it was just a continuous

(Testimony of Charles M. Tuckett.)

trouble with the tubes; the tubes used in the little 42 amplifiers; I had tested with these meters on panel 7 on exhibit 15 to see if these tubes were defective; also tested to see that they fitted in the sockets. If the tube was low we took it out and put in another; I don't remember what the limit of rejection was on the use of the tube; these tubes were a trouble that I told Gross about separate from the fuse blowing and loose connections but I don't really remember any other specific trouble, just a general complaint about fuse blowing out and having to wire for them; my tubes were being low; the cooperation I received from plaintiff about it was that they wired me; I wired them but that is all the good it did; they told me how to locate the trouble and also told me the engineer was on the way; we found the trouble before that; at that time I just summed it up in my own mind, I figured they wouldn't cooperate with me; I had all the trouble myself and so I just made the complaint to defendant; I wrote and signed this letter to plaintiff dated January 28, 1930.

Thereupon defendant's letter, signed by Tuckett, addressed to plaintiff, through Briggs, dated January 28, 1930, was received in evidence, marked

(Testimony of Charles M. Tuckett.)

PLAINTIFF'S EXHIBIT 40,

and reads:

“The Alaska Film Exchange
Juneau, Alaska

Jan. 28, 1930.

J. S. Briggs

Electrical Research Prod. Inc.

458 Skinner Bldg.

Seattle, Wash.

Dear Mr. Briggs;

Your cable and also your letter received. [532]

In answer to same we will state. Before we received your cable I and my operator succeeded in finding the trouble, as it was a case of have to, as you know away up here we have to keep the show going no matter what happens.

We appreciated your cable as it confirmed what we had found was wrong. Since fixing this light we have not had any trouble since.

While I am at it I would like to make a complaint against some of the tubes. #239 tube that we have been receiving are not much good in fact there is only one in about 50 that we get our hours out of. Last night we had to change two tubes that had only been working about ten hours. Anyway when your service man arrives we will take this matter up with him.

I understood from one of the service men that they had new tubes of this kind coming out. Is this so. And if so would we be able to get them.

(Testimony of Charles M. Tuckett.)

Also Mr. Darragh recommended two new lenses for our movietone, When will we be able to get these as I understand they are far superior to the ones we now have.

Thanking you for your co-operation in all our trouble we remain,

Very truly yours,

(Signed) CHAS. TUCKETT, Mgr."

Whereupon Witness Tuckett further testified: That letter dated January 28, 1930, referred to the trouble mentioned in defendant's telegram of January 17, 1930, heretofore put in evidence, defendant's exhibit N; the only trouble I think after that was from the photo electric cell but I don't recall just when that was; to my knowledge we didn't get any cooperation in fixing that trouble; the operator fixed it; he asked for a certain part and I went and got it for him; I wrote and signed this letter dated February 5, 1930.

Whereupon defendant's letter signed by Tuckett dated February 5, 1930, addressed to plaintiff through Briggs, was received in evidence, marked

(Testimony of Charles M. Tuckett.)

PLAINTIFF'S EXHIBIT 41,

and reads:

The Alaska Film Exchange
Juneau, Alaska.

Feb. 5, 1930

J. S. BRIGGS

Electrical Research Products Inc.

Seattle, Wash.

Dear Mr. Briggs: [533]

Your wire of Feb. 5, 1930 received and in regards to the trouble that we are having is as follows:

Our first trouble was in the pilot light which you were so kind as to check for us. But now our trouble is in the little green wire that runs from the Photo Electric Cell to the grid. We have fixed this for the time being. But when the engineer gets here he will have to put in a new wire as it is much to short.

One of your engineers cut this wire just so it was tight and gave no play in it. I would suggest that they have a little play in this wire as we have some vibration in our booth. This vibration is the cause I think of this wire becoming loose.

The tubes we mentioned do not hold up at all. One or two of the first tubes that came with the equipment is still working. But the last ones that have been shipped will not hold up more than 20 or 30 hours.

I would like very much if you will instruct your engineer to go over 700A on our red machine and fix

(Testimony of Charles M. Tuckett.)

up some of the connections as they are poorly made and this machine is the one that is giving us all our trouble.

The last two service men you have sent up here look over the machines in a hurry in fact hardly any of them have put in more than 40 minutes on our equipment and this you will admit is a short time.

We wish to thank you for the very fine co-operation you have given us in our trouble and we hope that now everything will work in A 1 shape.

Very truly yours,

(Signed) Chas. Tuckett''

Whereupon Witness Tuckett further testified: We eventually fixed Number 700-A machine, which is referred to in that letter; I don't remember what we did to fix it; Ned Lemieux fixed it; he worked on it quite a bit, but I don't remember just what it was he fixed: the main difficulty was with the photo electric cell wire: I know eventually I had to go to the Light Company and get a piece of wire so he could fix it: after he fixed it we had no more trouble.

I received all those reports for which I signed which are included in plaintiff's exhibits Nos. 7 to 14, both inclusive, Series 21, Series 22, and Series 23: my operators were qualified to make a general inspection every night and make minor adjustments [534] the ordinary conditions in the equipment from day to day; I would say they proved themselves qualified if anything unusual of any kind came to do it.

(Testimony of Charles M. Tuckett.)

At no time after the installation of the plaintiff's talkie equipment in either defendant's Ketchikan or Juneau Theatre and before its replevin, did either defendant or I contemplate closing either or both of those houses, because of poor business; business was good; I was in a position in 1930 to know whether or not either of these theatres was losing money and neither of them was losing money in the summer of 1930, and neither was in the red that summer; this telegram dated July 18, 1930, was sent by the Coliseum Theatre, Juneau to plaintiff through Witness Pearsall.

Whereupon defendant's telegram signed Coliseum Theatre dated July 18, 1930, addressed to plaintiff through Pearsall was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 42,

and reads:

"FA94 Collect NL via Seattle

1930 Jul 18 AM 6 16

Juneau Alaska 17

R. H. Pearsall

Electrical Research Prods Inc Los Angeles Calif

Gross out of town Unable to reach him in regards to service Will take up immediately upon his return Will straighten things up Then letter follows in regards to service If you force us we will either have to close both houses until we get adjustment of service charges as both houses are now in the red

Coliseum Theatre"

(Testimony of Charles M. Tuckett.)

Redirect Examination

Thereupon Witness Tuckett further testified: The purpose of sending that telegram was to stall them off; I sent it.

Whereupon the following proceedings were had:

“Q. What then did you mean my saying ‘You would force us’—What were they trying to force you to do?

Mr. ROBERTSON: Object as not the best evidence; the telegram speaks for itself.

The COURT: He may answer.

Mr. ROBERTSON: Exception. [535]

Q. What did you mean by ‘force us’—‘force us’ to do what?

A. I just put it in ‘force us to close the house.’ Couldn’t stand it. We write many letters of that effect to the film exchanges.

Q. What were they trying to force you to do?

A. Add service.

Q. How Much?

A. Nineteen dollars and seventy-five cents a week.

Q. Nineteen dollars?

A. Nineteen dollars and seventy-five cents a week.”

Whereupon Witness Tuckett further testified: That is what I referred to in my telegram; I had

(Testimony of Charles M. Tuckett.)

some trouble in 1930 and wired Seattle and received a telegram that an engineer was coming but before he came I adjusted the trouble myself; Smith's reports are missing from those that were introduced in evidence; also one for Lawrence signed under protest; I didn't see it; Smith is the man who was supposed to come in response to that telegram but he didn't come to my knowledge; I was told he was here though; I waited up for him but he didn't show up; I stated that there were some small items left out of those accounts that I prepared; I could not say exactly without going over the whole statement which they are, but Witness Stabler, who helped me make the accounts up—we took it under advisement and couldn't decide on the matter, whether it really belonged to the theatre or not so we left them out; the limit of the amount of them, I think, would be around \$250.00 which would cover it; I don't know whether the painting contract for redecorating the Coliseum Theatre was charged to expense or not; my recollection of the \$400.00 insurance paid Gould and Gould was Gross had been in Seattle and Gould and Gould sold him a bunch of insurance for his Ketchikan, Petersburg, Wrangell, Sitka, and Haines Theatres; it seems it was more than \$400.00, anyway we didn't pay any more of it and the insurance was cancelled so far as I know; that item was not included; the [536] item of \$656.00 or some such amount for plaintiff's equipment was put in as capital investment, a

(Testimony of Charles M. Tuckett.)

monthly payment; Internal Revenue ruled against putting it in as cost; there were certain expenses in connection with the income tax return in Ketchikan and Juneau that were higher than the amount that I used in these tabulations defendant's exhibits Series I and K, because the 1929 income tax report was refused by the Internal Revenue and they sent Clauson to check it up and then when they rejected it they didn't allow us for something like \$13,000.00 worth of stuff I had in there, expenses, in the amount was also an enormous film rental for the whole circuit which was \$33,000.00 and he only allotted Ketchikan one-third; Attorney Faulkner and I made a memorandum from the income tax returns showing the difference between the expenses in the income tax reports and the figures I have given the Court and Jury; defendant's income tax return for 1929 takes care of all of his business as a whole; all the money he received and all the money he expended from all the different sources. He had money received—Juneau—\$52,578.55; Ketchikan, \$58,222.74, plus some rentals; the expenses at Ketchikan were \$52,120.37 and the expenses at Juneau were \$52,545.71; in expenses \$11,912.27; film, Juneau, paid out; and \$33,981 Ketchikan paid out; these two figures combined total the amount paid for films during the year, which were used in other than Ketchikan and Juneau, which made a total of \$45,894.03. When I tabulated this statement here I only use 1/4th of the cost of film rental, which was

(Testimony of Charles M. Tuckett.)

the allotment we allotted to Ketchikan, so it would be 1/4th, 25% of that film rental to be allotted to Ketchikan, which is approximately eleven thousand dollars; I haven't the exact figures. When they rechecked our income tax I had in as expenses motion picture machines \$6,838.93, payment on organs \$4,500.00, life insurance \$905.26, special assessments and tax \$707.62; bad debts \$705.66; contributions \$312.00 which made a total of \$13,969.37, which the Government refused me. They disallowed it, which is the summary here, which they made, is marked [537] very plain, so that is the reason of the cause of the difference in the two figures; the total difference is \$18,693.75, film rental \$13,969.00, income tax deductions, total \$32,662.75, which just about checks with the figures given here in Court; before I testified I submitted the income tax report and Treasury Department action on it to the other side; they questioned me this morning about the report itself not on the final figures given me; defendant's 1930 income tax report was corrected by the collector and shown to be \$34,084.10; I haven't had time to check those figures with the ones I gave here; to your question, "In making up the figures did you take into consideration the income tax report?" I answer "Just the receipts only." The business in any theatre always fluctuates, depending upon weather conditions, pictures mostly, different grades of pictures, you know; if a picture happened to be the kind people want you get a

(Testimony of Charles M. Tuckett.)

bigger play; in February, 1930, the Juneau expenses were quite high, that was a high month for 1930; we had a little bit more film rental; it wasn't especially high, that is about the average; I answered on Cross Examination that the Capitol Theatre opened in Juneau January 15, 1931; as a matter of fact it had been running about fifteen years before that practically all the time.

Thereupon the following proceedings took place:

“Mr. HELLENTHAL: Your Honor, I was going to put in some schedules with this witness. We have not been able to get them ready and I will not detain this witness on that account; but we can put them in with Mr. Stabler. If Mr. Tuckett is here Monday morning we will put them in. If not we will put them in by Mr. Stabler. I don't want to be understood as discharging the witness now.

Recross Examination.

Thereupon Witness Tuckett further testified: New equipment was put in the Capitol Theatre and it was renovated and started under new management January 15, 1931;

Thereupon the following proceedings were had:

[538]

“Q. Now, Mr. Tuckett, under your corrected tax return for Mr. Gross, corrected income tax return for the calendar year 1929, you reported after it was corrected, expenses of the Juneau theatre as \$43,672.44 didn't you?

(Testimony of Charles M. Tuckett.)

A. No, I said—What I really meant was this expense cannot be tabulated in here in either Juneau or Ketchikan, that the income tax covers all Mr. Gross' property, and that you can't segregate those two from the income tax.

Q. But you reported, when you made the corrected income tax return for Mr. Gross for the calendar year, 1929, the expenses of the Juneau Coliseum theatre were reported at \$43,672.44, is that correct?

A. I haven't that here.

Mr. HELLENTHAL: Object as incompetent, irrelevant and immaterial. What he reported is not the question. It is what this was finally settled at. We offer the report there because the report itself is the best evidence.

Q. Isn't that what you reported? That memo you have there was made by Mr. Faulkner; it is in his handwriting, isn't it?

A. Yes, he and I made it up; but this report is not correct; I can't testify to this.

Q. The question I asked you is if on your corrected return for 1929 you didn't report as expenses of the Coliseum Theatre, Juneau, \$43,672.44.

A. I have no figures like that.

Q. Can't you look at your return and—Say! You are looking at the memo in Mr. Faulkner's handwriting. I asked you to look at the income

(Testimony of Charles M. Tuckett.)

tax return and various reports you got there for 1929.

A. I reported how much?

Q. In the corrected return for 1929, as expenses of the Juneau Coliseum Theatre—\$43,672.44?

A. I didn't have any figures like that.

Q. Do you have a corrected return for that year?

A. I have the return, what they call unallowable deductions; they didn't allow deductions on it. They took it off. It had nothing to do with receipts, but these deductions include both Ketchikan and Juneau.

Q. I am not asking about receipts.

A. I am talking about expenses—\$13,679.37, include both Juneau and Ketchikan. I couldn't give you the total expenses of either one of the theatres from these deductions. [539]

Q. Didn't you, in that corrected return in January, 1929, for Mr. Gross, return expenses of the Ketchikan theatre as \$47,024.27?

A. I don't see it at all here.

The COURT: I suggest you show the witness the document to which you refer and give him an opportunity to explain it. He shows he don't understand it.

Mr. ROBERTSON: I submit he has it there.

The COURT: Show him the document you have there, or go on to something else.

Mr. ROBERTSON: I have no documents.

(Testimony of Charles M. Tuckett.)

The COURT: All right. He told you he didn't know, what you are talking about.

Mr. ROBERTSON: Then at this time I ask to have the returns he now has in his hands marked as an exhibit for identification so we can examine again.

Q. Your answer is, you don't know what I am talking about?

A. No, I can't find the figures.

Q. Have you the income tax return for 1930?

A. They are all there.

Q. Now, Mr. Tuckett, have you got the returns there for Mr. Gross for the calendar year 1930?

A. Yes, right there.

Q. Will you please look at them. How much did you return the expenses of the Juneau Coliseum theatre for that year in that return?

A. I made a return for Juneau theatre and the apartments, total operating expenses \$45,-500.13.

Q. Was the corrected return?

A. Yes sir.

Q. How much of that was for the apartment?

A. That I couldn't segregate, I would have to go figure it out again.

Q. You are unable to figure that?

A. I could by going over the books.

(Testimony of Charles M. Tuckett.)

Q. How much did you return for the Ketchikan Coliseum theatre as expenses for that year?

A. As expenses?

Q. Yes. [540]

A. \$19,051.10, without films.

Q. In your corrected return?

A. Yes sir.

Q. Without films?

A. Yes sir.

Q. What was the cost of films?

A. \$42,724.16.

Q. With films?

A. No, that is the film billed, the film bill itself.

Q. How much of that film bill was applied to Juneau?

A. Fifty per cent.

Q. How much to Ketchikan?

A. Twenty-five.

Q. That would be added to those respective amounts you named a few minutes ago?

A. Yes, \$3,666.70 for film service."

Whereupon copies of defendant's income tax return for 1929 and for 1930 were marked respectively plaintiff's exhibits 43 and 44 for identification.

Re-Redirect Examination

Thereupon Witness Tuckett further testified: I would have to check to see whether or not the figures

(Testimony of Charles M. Tuckett.)

as finally settled for the years 1929 and 1930 as shown by those two reports, plaintiff's exhibits Nos. 43 and 44 for identification are the same as the figures that I gave in my tabulations, defendant's exhibits Series K and I, but the receipts are identical; those reports cover both Juneau and Ketchikan Theatres and the apartments.

Whereupon the following proceedings were had:

“Mr. HELLENTHAL: I think, Your Honor, while we are waiting I might offer defendant's exhibit ‘X’ in evidence. It has been referred to so often, and while it contains some statements not pertaining to the Coliseum, the book also contains entries, so I offer the whole bundle as one exhibit. [541]

Mr. ROBERTSON: The same general objection, incompetent, irrelevant and immaterial; doesn't go to the true measure of damages.

The COURT: Is that all this big bundle of checks?

Mr. HELLENTHAL: Yes, Your Honor. The checks are segregated by months and wrapped up in the bank statements.

The COURT: I thought it was already understood they might be marked and used for any purpose necessary.

Mr. HELLENTHAL: Yes, that was the understanding, but I think they are so connected it might be well to introduce them as an exhibit under the circumstances and let them be

(Testimony of Charles M. Tuckett.)

used either in this court, or any other court.

The COURT: Is that agreeable to counsel for the other side, subject to the general objections?

Mr. ROBERTSON: Yes. I don't see the necessity for putting them all in, if counsel wants to offer them—simply a bundle of papers.

The COURT: Of course there is a lot of stuff there not pertaining to the issues,—not admissible at all.

Mr. ROBERTSON: Of course I don't suppose anybody could tell what is admissible or isn't.

The COURT: What I am getting at now, what I want to know now is whether you are agreeable to letting them be received subject to your general objection?

Mr. ROBERTSON: Yes, I don't see how I can make any further objection.

The COURT: It may be received with that understanding."

Whereupon a large bundle of check vouchers, statements, etc., was marked Defendant's Exhibit "X". None of which checks, vouchers, statements, etc. were individually exhibited or read to the jury at any time during the course of the trial, but which were taken by them into the jury room and the original whereof is hereby incorporated herein, and made a part hereof. [542]

(Testimony of Charles M. Tuckett.)

DEFENDANT'S EXHIBIT U,
bank deposit book with The B. M. Behrends Bank
from April 19, 1928, to October 8, 1932, both inclu-
sive, reads:

“The B. M. Behrends Bank in account with Col-
iseum Theatre, Cr.

Deposits			Deposits		
Apl	19, 1928	\$ 76.40	Jun	11, 1928	\$232.00
Apl	20, 1928	138.00	Jun	13, 1928	125.70
Apl	21, 1928	143.80	Jun	15, 1928	174.45
Apl	23, 1928	332.60	Jun	18, 1928	237.40
Apl	24, 1928	57.40	Jun	20, 1928	65.50
Apl	25, 1928	48.60	Jun	22, 1928	116.55
Apl	26, 1928	50.90	Jun	25, 1928	297.60
Apl	27, 1928	160.20	Jun	26, 1928	45.20
Apl	27, 1928	90.50	Jun	27, 1928	84.90
Apl	30, 1928	248.10	Jun	29, 1928	83.30
May	1, 1928	58.50	Jun	30, 1928	75.70
May	3, 1928	93.60	Jul	2, 1928	210.90
May	4, 1928	125.50	Jul	3, 1928	52.30
May	5, 1928	105.60	Jul	5, 1928	197.65
May	7, 1928	249.60	Jul	6, 1928	89.40
May	8, 1928	50.90	Jul	7, 1928	82.50
May	9, 1928	92.00	Jul	9, 1928	250.70
May	11, 1928	188.80	Jul	11, 1928	186.00
May	12, 1928	125.10	Jul	13, 1928	132.10
May	14, 1928	234.20	Jul	14, 1928	50.70
May	16, 1928	106.80	Jul	16, 1928	208.70
May	18, 1928	99.80	Jul	18, 1928	130.40
May	18, 1928	26.00	July	20, 1928	168.10
May	19, 1928	71.70	Jul	21, 1928	122.30
May	21, 1928	214.90	Jul	23, 1928	244.00
May	28, 1928	92.10	Jul	25, 1928	111.15
May	24, 1928	55.00	Jul	27, 1928	161.95
May	25, 1928	102.10	Jul	30, 1928	296.50
May	26, 1928	103.10	Aug	1, 1928	102.50
May	28, 1928	246.00	Aug	3, 1928	145.80
May	31, 1928	195.30	Aug	4, 1928	86.30
Jun	1, 1928	96.60	Aug	6, 1928	201.20
Jun	2, 1928	71.20	Aug	9, 1928	119.90
Jun	4, 1928	223.30	Aug	11, 1928	140.35
Jun	6, 1928	118.40	Aug	13, 1928	242.80
Jun	8, 1928	92.80	Aug	15, 1928	196.90

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Aug	17, 1928	\$163.70	Oct	26, 1928	\$145.20
Aug	20, 1928	368.00	Oct	26, 1928	114.30
Aug	22, 1928	153.50	Oct	26, 1928	125.00
Aug	24, 1928	244.50	Oct	29, 1928	330.90
Aug	25, 1928	89.20	Oct	31, 1928	141.50
Aug	25, 1928	258.70	Nov	2, 1928	177.65
Aug	29, 1928	138.60	Nov	3, 1928	120.40
Aug	31, 1928	166.70	Nov	5, 1928	349.10
Sep	4, 1928	248.30	Nov	7, 1928	110.95
Sep	4, 1928	132.20	Nov	9, 1928	193.60
Sep	6, 1928	107.95	Nov	10, 1928	156.70
		[543]	Nov	12, 1928	305.50
Sep	7, 1928	117.90	Nov	14, 1928	184.90
Sep	10, 1928	348.70	Nov	15, 1928	125.40
Sep	12, 1928	259.80	Nov	17, 1928	117.00
Sep	14, 1928	127.90	Nov	19, 1928	274.90
Sep	17, 1928	271.70	Nov	21, 1928	155.80
Sep	20, 1928	315.25	Nov	23, 1928	333.60
Sep	21, 1928	122.50	Nov	24, 1928	200.60
Sep	22, 1928	150.50	Nov	26, 1928	283.10
Sep	24, 1928	326.85	Nov	28, 1928	97.90
Sep	26, 1928	174.00	Nov	30, 1928	304.50
Sep	27, 1928	79.70	Dec	1, 1928	91.40
Sep	28, 1928	157.80	Dec	3, 1928	281.90
Sep	29, 1928	165.50	Dec	5, 1928	111.70
Oct	1, 1928	305.50	Dec	7, 1928	112.30
Oct	3, 1928	178.30	Dec	10, 1928	361.40
Oct	5, 1928	177.40	Dec	14, 1928	87.90
Oct	6, 1928	126.20	Dec	17, 1928	150.00
Oct	8, 1928	297.90	Dec	17, 1928	236.20
Oct	10, 1928	125.00	Dec	19, 1928	100.70
Oct	12, 1928	163.50	Dec	21, 1928	138.00
Oct	13, 1928	120.40	Dec	24, 1928	267.25
Oct	15, 1928	308.90	Dec	26, 1928	276.70
Oct	17, 1928	176.40	Dec	27, 1928	92.90
Oct	19, 1928	185.20	Dec	28, 1928	74.10
Oct	20, 1928	121.10	Dec	29, 1928	55.90
Oct	22, 1928	319.30	Dec	31, 1928	246.10
Oct	25, 1928	52.70	Jan	2, 1929	305.50
Oct	25, 1928	129.30	Jan	3, 1929	84.85

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Jan	4, 1929	\$ 38.70	Mar	23, 1929	\$115.30
Jan	5, 1929	45.40	Mar	25, 1929	264.90
Jan	7, 1929	209.90	Mar	28, 1929	148.45
Jan	9, 1929	74.80	Mar	29, 1929	118.95
Jan	11, 1929	129.10	Apr	1, 1929	311.20
Jan	14, 1929	368.90	Apr	4, 1929	194.80
Jan	16, 1929	102.00	Apr	6, 1929	201.10
Jan	18, 1929	179.10	Apr	8, 1929	297.90
Jan	21, 1929	382.30	Apr	12, 1929	319.60
Jan	25, 1929	126.20	Apr	15, 1929	359.90
Jan	25, 1929	157.80	Apr	17, 1929	91.00
Jan	28, 1929	177.00	Apr	19, 1929	175.95
Jan	28, 1929	106.80	Apr	22, 1929	356.61
Jan	31, 1929	124.00	Apr	25, 1929	149.70
Feb	4, 1929	190.60	Apr	27, 1929	189.10
Feb	4, 1929	256.80	Apr	29, 1929	329.40
Feb	7, 1929	132.10	Apr	30, 1929	85.30
		[544]	May	3, 1929	140.95
Feb	9, 1929	162.20	May	6, 1929	334.20
Feb	11, 1929	304.30	May	6, 1929	42.50
Feb	13, 1929	158.75	May	10, 1929	221.60
Feb	15, 1929	155.80	May	13, 1929	356.50
Feb	18, 1929	94.80	May	15, 1929	664.50
Feb	18, 1929	245.20	May	16, 1929	320.50
Feb	21, 1929	156.60	May	16, 1929	37.80
Feb	25, 1929	158.30	May	17, 1929	180.75
Feb	25, 1929	267.85	May	18, 1929	153.75
Feb	28, 1929	134.70	May	20, 1929	380.40
Mar	1, 1929	107.10	May	20, 1929	68.00
Mar	2, 1929	77.80	May	22, 1929	482.85
Mar	4, 1929	304.00	May	23, 1929	167.15
Mar	7, 1929	132.00	May	25, 1929	172.30
Mar	8, 1929	116.70	May	25, 1929	45.00
Mar	11, 1929	312.15	May	27, 1929	318.80
Mar	14, 1929	75.00	May	29, 1929	164.35
Mar	14, 1929	81.20	May	31, 1929	254.50
Mar	18, 1929	351.00	Jun	1, 1929	59.90
Mar	18, 1929	75.00	Jun	3, 1929	283.30
Mar	20, 1929	121.60	Jun	5, 1929	160.00
Mar	22, 1929	188.70	Jun	7, 1929	125.50

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Jun	8, 1929	\$131.30	Aug	2, 1929	\$182.00
Jun	10, 1929	423.20	Aug	5, 1929	374.80
Jun	14, 1929	200.00	Aug	6, 1929	124.05
Jun	14, 1929	169.05	Aug	7, 1929	308.85
Jun	15, 1929	72.10	Aug	8, 1929	155.60
Jun	17, 1929	361.80	Aug	10, 1929	82.50
Jun	18, 1929	69.40	Aug	12, 1929	343.45
Jun	19, 1929	493.70	Aug	13, 1929	56.05
Jun	20, 1929	300.00	Aug	14, 1929	676.90
Jun	21, 1929	36.00	Aug	14, 1929	434.90
Jun	21, 1929	110.10	Aug	16, 1929	218.05
Jun	22, 1929	69.95	Aug	17, 1929	186.50
Jun	24, 1929	300.00	Aug	21, 1929	317.75
Jun	26, 1929	353.10	Aug	22, 1929	160.45
Jun	27, 1929	228.65	Aug	23, 1929	95.30
Jun	28, 1929	75.45	Aug	24, 1929	60.35
Jul	2, 1929	110.05	Aug	26, 1929	373.95
Jul	3, 1929	102.80	Aug	27, 1929	75.20
Jul	5, 1929	845.75	Aug	29, 1929	495.95
Jul	6, 1929	237.35	Sep	3, 1929	101.10
Jul	8, 1929	342.50	Sep	3, 1929	573.30
Jul	10, 1929	372.75	Sep	5, 1929	499.40
		[545]	Sep	9, 1929	647.40
Jul	11, 1929	271.20	Sep	12, 1929	421.95
Jul	12, 1929	73.85	Sep	16, 1929	532.65
Jul	13, 1929	81.90	Sep	20, 1929	359.55
Jul	15, 1929	379.90	Sep	24, 1929	500.50
Jul	18, 1929	215.30	Sep	24, 1929	116.20
Jul	19, 1929	242.50	Sep	26, 1929	478.60
Jul	19, 1929	141.70	Sep	30, 1929	662.70
Jul	20, 1929	112.30	Oct	3, 1929	556.55
Jul	22, 1929	411.20	Oct	7, 1929	660.45
Jul	24, 1929	516.00	Oct	10, 1929	460.21
Jul	25, 1929	279.25	Oct	14, 1929	602.80
Jul	26, 1929	174.65	Oct	16, 1929	617.40
Jul	27, 1929	87.50	Oct	19, 1929	519.30
Jul	27, 1929	429.40	Oct	22, 1929	406.05
Jul	30, 1929	86.35	Oct	24, 1929	582.70
Jul	31, 1929	315.30	Oct	28, 1929	696.15
Aug	1, 1929	280.70	Nov	1, 1929	399.80

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Nov	1, 1929	\$200.00	Mar	10, 1930	\$336.40
Nov	4, 1929	666.30	Mar	13, 1930	381.50
Nov	6, 1929	349.85	Mar	17, 1930	533.90
Nov	9, 1929	374.40	Mar	24, 1930	463.40
Nov	12, 1929	681.35	Mar	24, 1930	369.00
Nov	12, 1929	232.85	Mar	29, 1930	461.55
Nov	16, 1929	317.60	Apr	1, 1930	368.50
Nov	18, 1929	777.50	Apr	3, 1930	664.95
Nov	22, 1929	610.45	Apr	5, 1930	304.60
Nov	25, 1929	692.45	Apr	5, 1930	389.25
Nov	29, 1929	765.47	Apr	11, 1930	377.80
Dec	2, 1929	555.20	Apr	14, 1930	521.65
Dec	5, 1929	648.85	Apr	17, 1930	1000.00
Dec	9, 1929	626.55	Apr	19, 1930	579.35
Dec	12, 1929	583.85	Apr	21, 1930	644.75
Dec	16, 1929	694.30	Apr	22, 1930	302.65
Dec	20, 1929	267.70	Apr	24, 1930	167.00
Dec	23, 1929	354.80	Apr	28, 1930	670.85
Dec	26, 1929	568.10	May	2, 1930	449.20
Dec	30, 1929	650.95	May	5, 1930	594.20
Jan	2, 1930	663.85	May	8, 1930	325.25
Jan	6, 1930	480.55	May	12, 1930	746.70
Jan	9, 1930	386.15	May	16, 1930	451.05
Jan	13, 1930	640.60	May	16, 1930	102.15
Jan	17, 1930	492.70	May	19, 1930	559.95
Jan	20, 1930	649.60	May	21, 1930	191.60
Jan	24, 1930	440.55	May	26, 1930	668.85
Jan	27, 1930	486.65	May	29, 1930	235.15
Jan	30, 1930	382.70	Jun	2, 1930	599.45
Feb	2, 1930	639.55	Jun	5, 1930	404.95
		[546]	Jun	9, 1930	584.75
Feb	6, 1930	302.60	Jun	11, 1930	324.55
Feb	10, 1930	623.70	Jun	14, 1930	295.20
Feb	14, 1930	366.35	Jun	14, 1930	400.00
Feb	17, 1930	448.10	Jun	16, 1930	306.55
Feb	20, 1930	327.95	Jun	18, 1930	365.95
Feb	24, 1930	671.15	Jun	23, 1930	640.72
Feb	28, 1930	375.44	Jun	26, 1930	256.37
Mar	3, 1930	577.15	Jun	30, 1930	440.79
Mar	8, 1930	551.65	Jul	2, 1930	457.85

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Jul	3, 1930	\$211.50	Sep	18, 1930	\$305.40
Jul	5, 1930	475.85	Sep	19, 1930	185.05
Jul	7, 1930	354.45	Sep	20, 1930	118.35
Jul	10, 1930	398.85	Sep	22, 1930	367.90
Jul	14, 1930	446.85	Sep	23, 1930	110.00
Jul	16, 1930	314.00	Sep	24, 1930	200.45
Jul	21, 1930	679.65	Sep	25, 1930	154.30
Jul	24, 1930	248.10	Sep	26, 1930	92.85
Jul	28, 1930	408.70	Sep	27, 1930	74.05
Jul	30, 1930	225.20	Sep	29, 1930	429.55
Jul	31, 1930	174.50	Sep	30, 1930	54.95
Aug	1, 1930	170.00	Oct	1, 1930	191.60
Aug	4, 1930	555.50	Oct	2, 1930	130.15
Aug	6, 1930	266.70	Oct	3, 1930	64.35
Aug	6, 1930	239.25	Oct	4, 1930	120.05
Aug	11, 1930	313.80	Oct	6, 1930	423.90
Aug	16, 1930	344.50	Oct	7, 1930	96.00
Aug	16, 1930	385.00	Oct	8, 1930	131.95
Aug	16, 1930	250.00	Oct	9, 1930	126.95
Aug	18, 1930	384.10	Oct	10, 1930	68.70
Aug	20, 1930	227.70	Oct	11, 1930	177.25
Aug	21, 1930	165.23	Oct	13, 1930	562.25
Aug	25, 1930	521.18	Oct	14, 1930	167.15
Aug	27, 1930	325.25	Oct	15, 1930	129.05
Aug	29, 1930	309.85	Oct	17, 1930	228.45
Sep	2, 1930	453.90	Oct	20, 1930	717.15
Sep	2, 1930	144.50	Oct	22, 1930	229.30
Sep	3, 1930	197.55	Oct	23, 1930	202.45
Sep	5, 1930	193.00	Oct	27, 1930	713.54
Sep	6, 1930	100.05	Oct	29, 1930	103.85
Sep	8, 1930	292.50	Oct	30, 1930	268.70
Sep	9, 1930	93.40	Nov	3, 1930	604.55
Sep	10, 1930	253.50	Nov	5, 1930	258.40
Sep	11, 1930	133.95	Nov	7, 1930	212.80
Sep	12, 1930	89.65	Nov	10, 1930	507.50
Sep	13, 1930	98.90	Nov	12, 1930	333.25
		[547]	Nov	15, 1930	288.95
Sep	16, 1930	140.40	Nov	17, 1930	336.90
Sep	17, 1930	100.00	Nov	19, 1930	205.00
Sep	17, 1930	84.20	Nov	21, 1930	207.25

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Nov	24, 1930	\$511.20	Feb	24, 1931	\$118.00
Nov	26, 1930	164.75	Feb	24, 1931	394.05
Nov	28, 1930	277.35	Feb	26, 1931	101.15
Dec	1, 1930	493.85			[548]
Dec	3, 1930	173.45	Feb	28, 1931	184.45
Dec	5, 1930	276.15	Mar	2, 1931	256.10
Dec	6, 1930	109.35	Mar	6, 1931	148.15
Dec	8, 1930	474.60	Mar	6, 1931	174.20
Dec	10, 1930	221.75	Mar	9, 1931	388.40
Dec	11, 1930	128.60	Mar	10, 1931	112.75
Dec	13, 1930	189.15	Mar	16, 1931	475.85
Dec	15, 1930	502.40	Mar	19, 1931	298.75
Dec	17, 1930	370.80	Mar	21, 1931	603.85
Dec	19, 1930	205.55	Mar	28, 1931	289.75
Dec	20, 1930	169.95	Mar	31, 1931	312.15
Dec	22, 1930	517.75	Apr	2, 1931	143.20
Dec	24, 1930	240.00	Apr	4, 1931	198.30
Dec	26, 1930	511.00	Apr	6, 1931	330.80
Dec	29, 1930	658.65	Apr	8, 1931	167.65
Dec	31, 1930	274.55	Apr	11, 1931	225.20
Jan	2, 1931	379.36	Apr	11, 1931	240.00
Jan	3, 1931	112.50	Apr	13, 1931	373.95
Jan	5, 1931	434.85	Apr	15, 1931	157.25
Jan	7, 1931	199.60	Apr	17, 1931	203.10
Jan	9, 1931	184.45	Apr	20, 1931	501.50
Jan	12, 1931	533.35	Apr	22, 1931	160.68
Jan	14, 1931	234.25	Apr	27, 1931	426.90
Jan	16, 1931	120.10	Apr	29, 1931	153.30
Jan	19, 1931	290.45	May	1, 1931	187.92
Jan	21, 1931	207.50	May	2, 1931	70.50
Jan	24, 1931	216.10	May	4, 1931	292.10
Jan	26, 1931	247.65	May	6, 1931	103.60
Jan	30, 1931	187.25	May	7, 1931	33.25
Feb	2, 1931	275.15	May	8, 1931	31.45
Feb	5, 1931	283.35	May	9, 1931	49.10
Feb	9, 1931	250.00	May	11, 1931	319.55
Feb	9, 1931	443.80	May	12, 1931	53.55
Feb	11, 1931	272.60	May	13, 1931	71.20
Feb	16, 1931	462.05	May	14, 1931	62.75
Feb	20, 1931	294.08	May	15, 1931	87.65

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
May	16, 1931	\$ 32.85	Jul	9, 1931	\$119.50
May	18, 1931	240.30	Jul	13, 1931	348.65
May	18, 1931	88.10	Jul	14, 1931	73.70
May	20, 1931	45.75	Jul	15, 1931	44.55
May	20, 1931	41.70	Jul	17, 1931	134.90
May	22, 1931	158.65	Jul	20, 1931	298.25
May	23, 1931	125.90	Jul	21, 1931	62.95
May	25, 1931	152.55	Jul	22, 1931	74.00
May	25, 1931	150.00	Jul	25, 1931	37.85
May	26, 1931	96.05			[549]
May	27, 1931	57.00	Jul	27, 1931	389.27
May	28, 1931	48.70	Jul	28, 1931	48.90
May	29, 1931	196.50	Jul	29, 1931	80.70
May	29, 1931	65.00	Aug	1, 1931	135.70
Jun	2, 1931	621.30	Aug	3, 1931	277.80
Jun	3, 1931	38.60	Aug	4, 1931	117.30
Jun	4, 1931	33.30	Aug	5, 1931	41.45
Jun	5, 1931	103.65	Aug	6, 1931	30.10
Jun	6, 1931	68.30	Aug	7, 1931	82.50
Jun	8, 1931	214.75	Aug	10, 1931	319.55
Jun	9, 1931	41.10	Aug	11, 1931	60.60
Jun	10, 1931	86.00	Aug	12, 1931	60.25
Jun	12, 1931	133.80	Aug	14, 1931	132.60
Jun	13, 1931	46.10	Aug	17, 1931	336.05
Jun	15, 1931	236.40	Aug	18, 1931	58.25
Jun	15, 1931	346.70	Aug	20, 1931	99.05
Jun	16, 1931	94.20	Aug	22, 1931	151.25
Jun	18, 1931	104.20	Aug	24, 1931	308.30
Jun	19, 1931	78.15	Aug	25, 1931	72.75
Jun	20, 1931	53.00	Aug	26, 1931	67.60
Jun	22, 1931	201.55	Aug	28, 1931	173.65
Jun	23, 1931	90.20	Aug	29, 1931	218.90
Jun	24, 1931	66.00	Aug	31, 1931	412.65
Jun	25, 1931	37.70	Sep	1, 1931	129.95
Jun	27, 1931	106.95	Sep	2, 1931	62.75
Jun	29, 1931	201.10	Sep	3, 1931	103.30
Jul	1, 1931	122.95	Sep	4, 1931	100.90
Jul	3, 1931	192.00	Sep	5, 1931	88.70
Jul	6, 1931	658.15	Sep	8, 1931	348.65
Jul	7, 1931	119.75	Sep	9, 1931	43.90

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Sep	10, 1931	\$ 65.00	Oct	30, 1931	\$114.15
Sep	11, 1931	121.20	Oct	31, 1931	63.65
Sep	12, 1931	80.95	Nov	2, 1931	198.75
Sep	14, 1931	195.95	Nov	4, 1931	129.10
Sep	15, 1931	72.60	Nov	5, 1931	64.20
Sep	16, 1931	87.85	Nov	6, 1931	82.00
Sep	17, 1931	83.80	Nov	9, 1931	317.65
Sep	18, 1931	171.65	Nov	12, 1931	215.80
Sep	19, 1931	164.75	Nov	13, 1931	133.45
Sep	21, 1931	221.45	Nov	16, 1931	232.90
Sep	22, 1931	54.15	Nov	19, 1931	44.50
Sep	23, 1931	70.95	Nov	20, 1931	44.70
Sep	24, 1931	70.35	Nov	21, 1931	284.55
Sep	25, 1931	94.35	Nov	23, 1931	234.75
Sep	26, 1931	59.85	Nov	23, 1931	78.25
Sep	28, 1931	194.50			[550]
Sep	29, 1931	72.90	Nov	24, 1931	69.30
Oct	2, 1931	91.35	Nov	25, 1931	51.90
Oct	3, 1931	129.40	Nov	27, 1931	351.45
Oct	5, 1931	308.40	Nov	28, 1931	134.00
Oct	6, 1931	69.05	Nov	30, 1931	206.00
Oct	7, 1931	82.00	Dec	1, 1931	59.35
Oct	8, 1931	81.60	Dec	2, 1931	38.35
Oct	9, 1931	109.10	Dec	3, 1931	42.80
Oct	10, 1931	107.00	Dec	4, 1931	56.25
Oct	12, 1931	259.50	Dec	5, 1931	78.65
Oct	13, 1931	40.30	Dec	7, 1931	274.20
Oct	14, 1931	60.35	Dec	8, 1931	56.70
Oct	15, 1931	72.60	Dec	10, 1931	69.65
Oct	15, 1931	157.90	Dec	11, 1931	116.30
Oct	17, 1931	122.70	Dec	12, 1931	97.40
Oct	20, 1931	299.80	Dec	14, 1931	259.12
Oct	21, 1931	47.80	Dec	15, 1931	43.35
Oct	22, 1931	48.49	Dec	16, 1931	41.15
Oct	23, 1931	56.70	Dec	17, 1931	45.20
Oct	24, 1931	90.65	Dec	18, 1931	98.35
Oct	26, 1931	198.20	Dec	19, 1931	91.00
Oct	27, 1931	62.45	Dec	21, 1931	271.45
Oct	28, 1931	38.55	Dec	22, 1931	48.35
Oct	29, 1931	59.20	Dec	24, 1931	73.97

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Dec	26, 1931	\$175.55	Feb	16, 1932	\$104.00
Dec	26, 1931	254.30	Feb	17, 1932	66.05
Dec	29, 1931	75.55	Feb	18, 1932	76.60
Dec	31, 1931	81.75	Feb	19, 1932	72.90
Jan	2, 1932	265.05	Feb	23, 1932	241.00
Jan	4, 1932	224.85	Feb	24, 1932	30.40
Jan	5, 1932	40.50	Feb	26, 1932	87.55
Jan	6, 1932	31.80	Feb	27, 1932	53.15
Jan	7, 1932	46.35	Feb	29, 1932	253.05
Jan	8, 1932	53.05	Mar	1, 1932	72.10
Jan	9, 1932	57.85	Mar	2, 1932	97.45
Jan	11, 1932	295.75	Mar	3, 1932	36.00
Jan	12, 1932	35.90	Mar	4, 1932	48.60
Jan	13, 1932	30.40	Mar	5, 1932	51.60
Jan	14, 1932	44.00	Mar	7, 1932	237.55
Jan	15, 1932	109.55	Mar	8, 1932	64.15
Jan	18, 1932	308.90	Mar	15, 1932	158.00
Jan	19, 1932	39.35	Mar	16, 1932	43.40
Jan	20, 1932	36.85	Mar	17, 1932	33.70
Jan	21, 1932	46.70	Mar	18, 1932	43.65
Jan	22, 1932	48.30	Mar	21, 1932	328.80
Jan	23, 1932	60.05	Mar	22, 1932	65.30
Jan	25, 1932	257.57			[551]
Jan	26, 1932	39.90	Mar	25, 1932	104.90
Jan	27, 1932	65.95	Mar	26, 1932	45.55
Jan	28, 1932	29.00	Mar	28, 1932	179.80
Jan	29, 1932	28.05	Mar	29, 1932	43.05
Jan	30, 1932	61.55	Mar	31, 1932	73.10
Feb	1, 1932	252.55	Apr	1, 1932	33.70
Feb	1, 1932	270.00	Apr	2, 1932	50.60
Feb	2, 1932	59.70	Apr	4, 1932	274.60
Feb	3, 1932	96.95	Apr	5, 1932	104.15
Feb	4, 1932	94.40	Apr	6, 1932	57.95
Feb	5, 1932	39.40	Apr	7, 1932	60.90
Feb	6, 1932	56.60	Apr	8, 1932	79.40
Feb	8, 1932	228.55	Apr	9, 1932	77.15
Feb	9, 1932	68.25	Apr	11, 1932	231.45
Feb	10, 1932	130.05	Apr	12, 1932	54.40
Feb	11, 1932	99.40	Apr	13, 1932	93.05
Feb	15, 1932	357.55	Apr	14, 1932	37.40

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Apr	15, 1932	\$ 23.60	Jun	8, 1932	\$ 64.50
Apr	16, 1932	50.48	Jun	9, 1932	50.00
Apr	18, 1932	248.15	Jun	10, 1932	70.60
Apr	19, 1932	67.60	Jun	11, 1932	77.65
Apr	19, 1932	30.00	Jun	13, 1932	265.85
Apr	20, 1932	60.10	Jun	14, 1932	46.85
Apr	21, 1932	34.85	Jun	15, 1932	66.15
Apr	23, 1932	61.45	Jun	16, 1932	89.85
Apr	25, 1932	211.45	Jun	17, 1932	89.95
Apr	26, 1932	39.70	Jun	20, 1932	202.50
Apr	27, 1932	51.85	Jun	21, 1932	58.60
Apr	28, 1932	38.35	Jun	22, 1932	52.20
Apr	29, 1932	37.15	Jun	23, 1932	49.80
Apr	29, 1932	160.00	Jun	24, 1932	71.70
May	2, 1932	214.30	Jun	27, 1932	213.15
May	3, 1932	45.50	Jun	28, 1932	45.65
May	4, 1932	59.65	Jun	29, 1932	52.95
May	5, 1932	48.85	Jun	30, 1932	65.95
May	7, 1932	79.60	Jun	30, 1932	15.00
May	9, 1932	229.40	Jul	1, 1932	53.81
May	10, 1932	69.70	Jul	2, 1932	24.70
May	11, 1932	50.20	Jul	5, 1932	409.55
May	12, 1932	45.80	Jul	6, 1932	91.60
May	13, 1932	48.10	Jul	7, 1932	49.50
May	14, 1932	42.20	Jul	9, 1932	100.85
May	16, 1932	236.55	Jul	11, 1932	125.60
May	17, 1932	79.25	Jul	13, 1932	96.80
May	18, 1932	42.40	Jul	18, 1932	324.80
May	23, 1932	119.55	Jul	20, 1932	118.80
May	24, 1932	32.05	Jul	22, 1932	141.95
May	25, 1932	49.35			[552]
May	27, 1932	141.10	Jul	25, 1932	198.64
May	28, 1932	149.05	Jul	28, 1932	102.87
May	31, 1932	336.63	Jul	29, 1932	49.50
Jun	1, 1932	64.60	Jul	29, 1932	40.00
Jun	2, 1932	72.50	Aug	1, 1932	208.96
Jun	3, 1932	152.50	Aug	3, 1932	95.80
Jun	4, 1932	142.35	Aug	5, 1932	222.55
Jun	6, 1932	163.50	Aug	8, 1932	282.95
Jun	7, 1932	43.60	Aug	10, 1932	121.50

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Aug	11, 1932	\$ 74.20	Sep	6, 1932	\$347.25
Aug	13, 1932	148.25	Sep	8, 1932	157.10
Aug	15, 1932	230.70	Sep	10, 1932	115.75
Aug	19, 1932	266.40	Sep	12, 1932	173.75
Aug	22, 1932	229.70	Sep	15, 1932	155.00
Aug	24, 1932	154.65	Sep	19, 1932	196.65
Aug	25, 1932	38.15	Sep	20, 1932	69.15
Aug	29, 1932	357.65	Sep	26, 1932	537.80
Sep	1, 1932	167.70	Oct	1, 1932	348.40
Sep	6, 1932	49.80	Oct	8, 1932	190.00

[553]

DEFENDANT'S EXHIBIT U-1,

bank deposit book with the Miners and Merchants Bank from January 2, 1931, to May 12, 1933, both inclusive, reads: "The Miners and Merchants Bank, Ketchikan, Alaska, in account with Coliseum Theatre, Cr.

Deposits			Deposits		
Jan	2, 1931	\$468.90	Feb	6, 1931	\$ 83.80
Jan	5, 1931	367.65	Feb	7, 1931	73.00
Jan	9, 1931	271.70	Feb	9, 1931	80.40
Jan	12, 1931	395.65	Feb	9, 1931	176.70
Jan	16, 1931	163.60	Feb	11, 1931	58.30
Jan	15, 1931	146.85	Feb	11, 1931	85.75
Jan	19, 1931	426.35	Feb	13, 1931	64.85
Jan	24, 1931	316.60	Feb	13, 1931	158.45
Jan	26, 1931	365.60	Feb	14, 1931	146.40
Jan	27, 1931	160.35	Feb	16, 1931	87.55
Jan	28, 1931	49.85	Feb	16, 1931	176.35
Jan	30, 1931	34.30	Feb	18, 1931	125.00
Jan	30, 1931	55.75	Feb	18, 1931	81.35
Jan	31, 1931	67.20	Feb	19, 1931	77.40
Feb	2, 1931	120.80	Feb	20, 1931	76.85
Feb	2, 1931	210.26	Feb	24, 1931	95.45
Feb	3, 1931	86.30	Feb	24, 1931	89.20
Feb	5, 1931	53.65	Feb	24, 1931	343.30
Feb	5, 1931	47.90	Feb	24, 1931	139.80

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
Feb	26, 1931	\$ 62.65	Apr	6, 1931	\$253.60
Feb	28, 1931	33.25	Apr	8, 1931	131.80
Feb	28, 1931	121.15	Apr	8, 1931	63.65
Feb	28, 1931	103.25	Apr	11, 1931	45.15
Mar	2, 1931	97.60	Apr	11, 1931	114.25
Mar	2, 1931	179.30			[554]
Mar	3, 1931	53.00	Apr	11, 1931	88.05
Mar	4, 1931	170.65	Apr	13, 1931	92.90
Mar	5, 1931	100.95	Apr	13, 1931	183.40
Mar	6, 1931	142.65	Apr	14, 1931	54.50
Mar	7, 1931	114.25	Apr	14, 1931	125.00
Mar	9, 1931	87.65	Apr	15, 1931	63.15
Mar	9, 1931	261.80	Apr	18, 1931	27.75
Mar	10, 1931	92.15	Apr	18, 1931	104.25
Mar	12, 1931	68.50	Apr	18, 1931	167.95
Mar	12, 1931	49.00	Apr	21, 1931	122.00
Mar	16, 1931	62.30	Apr	21, 1931	316.05
Mar	16, 1931	53.85	Apr	22, 1931	76.20
Mar	16, 1931	81.75	Apr	22, 1931	45.90
Mar	16, 1931	249.75	Apr	24, 1931	53.95
Mar	18, 1931	80.70	Apr	24, 1931	95.90
Mar	18, 1931	79.50	Apr	27, 1931	113.55
Mar	20, 1931	55.50	Apr	27, 1931	98.30
Mar	20, 1931	110.70	Apr	27, 1931	147.80
Mar	23, 1931	127.80	Apr	30, 1931	37.15
Mar	23, 1931	120.20	May	1, 1931	97.00
Mar	23, 1931	203.95	May	4, 1931	272.70
Mar	24, 1931	65.40	May	8, 1931	258.50
Mar	25, 1931	61.10	May	11, 1931	461.00
Mar	26, 1931	28.30	May	14, 1931	227.00
Mar	27, 1931	89.60	May	16, 1931	303.00
Mar	28, 1931	83.85	May	18, 1931	334.40
Mar	30, 1931	121.10	May	22, 1931	220.55
Mar	30, 1931	246.40	May	25, 1931	385.70
Mar	31, 1931	82.75	May	28, 1931	181.75
Apr	3, 1931	30.10	June	1, 1931	496.60
Apr	3, 1931	48.00	June	4, 1931	20.35
Apr	3, 1931	116.35	June	8, 1931	407.40
Apr	4, 1931	97.85	June	11, 1931	160.80
Apr	6, 1931	72.65	June	15, 1931	384.15

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
June	19, 1931	\$215.90	Nov	2, 1931	\$383.70
June	22, 1931	320.10	Nov	7, 1931	318.00
June	26, 1931	274.40	Nov	9, 1931	261.95
June	29, 1931	414.55	Nov	14, 1931	267.25
July	3, 1931	209.20	Nov	16, 1931	207.25
July	6, 1931	623.70	Nov	21, 1931	166.00
July	10, 1931	253.70	Nov	24, 1931	261.70
July	13, 1931	300.90	Nov	25, 1931	85.35
July	20, 1931	446.00	Nov	30, 1931	360.80
July	22, 1931	160.95	Dec	7, 1931	460.75
July	24, 1931	216.15	Dec	8, 1931	27.55
July	27, 1931	456.55	Dec	15, 1931	92.65
July	28, 1931	142.00	Dec	18, 1931	95.45
July	31, 1931	148.65			[555]
Aug	3, 1931	299.25	Dec	21, 1931	179.10
Aug	7, 1931	126.05	Dec	26, 1931	257.85
Aug	10, 1931	276.95	Jan	4, 1932	614.05
Aug	13, 1931	102.90	Jan	18, 1932	221.45
Aug	17, 1931	384.30	Jan	25, 1932	195.20
Aug	20, 1931	191.35	Feb	1, 1932	242.65
Aug	24, 1931	644.85	Feb	8, 1932	283.40
Aug	28, 1931	326.45	Feb	16, 1932	192.90
Aug	31, 1931	471.10	Feb	16, 1932	48.95
Sep	2, 1931	238.35	Feb	23, 1932	216.75
Sep	4, 1931	185.85	Feb	29, 1932	444.35
Sep	8, 1931	412.50	Mar	7, 1932	345.65
Sep	10, 1931	210.50	Mar	14, 1932	336.30
Sep	14, 1931	556.35	Mar	21, 1932	325.50
Sep	17, 1931	165.00	Mar	28, 1932	376.40
Sep	21, 1931	505.25	Apr	4, 1932	395.05
Sep	25, 1931	339.20	Apr	8, 1932	70.55
Sep	28, 1931	353.30	Apr	11, 1932	358.45
Oct	2, 1931	246.40	Apr	18, 1932	310.40
Oct	5, 1931	363.35	Apr	25, 1932	331.75
Oct	13, 1931	421.35	May	2, 1932	200.00
Oct	17, 1931	297.30	May	7, 1932	158.25
Oct	20, 1931	91.30	May	9, 1932	142.55
Oct	20, 1931	358.20	May	16, 1932	217.50
Oct	26, 1931	540.20	May	23, 1932	253.05
Oct	31, 1931	289.30	May	23, 1932	300.00

(Testimony of Charles M. Tuckett.)

Deposits			Deposits		
May	31, 1932	\$212.80	Nov	7, 1932	\$298.50
June	6, 1932	237.65	Nov	10, 1932	150.00
June	13, 1932	238.00	Nov	14, 1932	237.25
Jun	22, 1932	159.00	Nov	23, 1932	218.40
Jun	28, 1932	98.70	Nov	26, 1932	125.00
Jul	5, 1932	205.50	Nov	29, 1932	214.95
Jul	9, 1932	162.00	Dec	5, 1932	238.75
Jul	11, 1932	47.50	Dec	13, 1932	290.10
Jul	16, 1932	180.60	Dec	17, 1932	125.00
Jul	19, 1932	64.50	Dec	19, 1932	171.30
Jul	23, 1932	1757.70	Dec	27, 1932	209.80
Jul	25, 1931	182.35	Jan	3, 1933	228.95
Jul	25, 1931	82.30	Jan	9, 1933	231.15
Jul	30, 1931	122.88	Jan	17, 1933	303.10
Aug	1, 1931	195.95	Jan	23, 1933	199.15
Aug	8, 1931	231.64	Jan	27, 1933	42.33
Aug	10, 1932	91.50	Feb	1, 1933	163.15
Aug	15, 1932	207.84	Feb	6, 1933	274.80
Aug	19, 1932	140.29	Feb	15, 1933	210.95
Aug	23, 1932	104.85	Feb	21, 1933	148.95
Aug	29, 1932	220.60	Feb	27, 1933	190.45
Sep	6, 1932	260.95	Mar	13, 1933	122.35
Sep	10, 1932	255.20	Mar	20, 1933	121.30
Sep	13, 1932	96.75	Mar	27, 1933	201.40
Sep	17, 1932	289.70	Apr	1, 1933	50.00
Sep	19, 1932	172.65	Apr	3, 1933	98.85
Sep	26, 1932	311.95	Apr	11, 1933	189.75
Oct	3, 1932	254.95	Apr	18, 1933	134.40
Oct	10, 1932	404.85	Apr	22, 1933	50.00
Oct	15, 1932	200.00	Apr	25, 1933	91.25
Oct	17, 1932	180.08	Apr	25, 1933	20.00
Oct	26, 1932	346.50	May	12, 1933	36.65
Oct	31, 1932	397.75			[556]

DEFENDANT'S EXHIBIT U-2,

bank deposit book with The B. M. Behrends Bank from October 6, 1932 to August 14, 1933, both inclu-

(Testimony of Charles M. Tuckett.)

sive, reads: "The B. M. Behrends Bank in account with Coliseum Theatre, Juneau, Cr.

Deposits			Deposits		
Oct	6, 1932	\$169.45	Feb	8, 1933	\$ 75.30
Oct	10, 1932	416.25	Feb	13, 1933	386.25
Oct	10, 1932	100.00	Feb	17, 1933	94.25
Oct	13, 1932	264.30	Feb	20, 1933	303.10
Oct	17, 1932	386.95	Feb	27, 1933	509.65
Oct	19, 1932	157.95	Mar	13, 1933	372.50
Oct	22, 1932	107.20	Mar	13, 1933	350.00
Oct	24, 1932	238.90	Mar	15, 1933	83.85
Oct	26, 1932	104.55	Mar	20, 1933	374.90
Oct	27, 1932	73.35	Mar	25, 1933	136.60
Oct	31, 1932	363.80	Mar	27, 1933	173.25
Nov	3, 1932	162.20	Mar	28, 1933	52.05
Nov	7, 1932	370.10	Mar	29, 1933	48.60
Nov	14, 1932	474.00	Mar	29, 1933	60.00
Nov	21, 1932	497.10	Apr	3, 1933	254.35
Nov	25, 1932	338.50	Apr	10, 1933	258.45
Nov	28, 1932	357.70	Apr	12, 1933	145.58
Dec	2, 1932	185.70	Apr	17, 1933	272.25
Dec	7, 1932	81.15	Apr	19, 1933	58.15
Dec	12, 1932	387.20	Apr	20, 1933	38.20
Dec	16, 1932	188.90	Apr	24, 1933	280.98
Dec	16, 1932	60.00	Apr	26, 1933	75.60
Dec	19, 1932	245.80	May	1, 1933	162.50
Dec	22, 1932	116.05	Jun	19, 1933	225.50
Dec	27, 1932	406.30	Jun	19, 1933	400.00
Dec	31, 1932	230.50	Jun	19, 1933	860.00
Jan	4, 1933	329.50	Jun	26, 1933	80.00
Jan	6, 1933	162.50	Jun	29, 1933	40.00
Jan	9, 1933	201.35	Jun	29, 1933	120.00
Jan	16, 1933	460.55	Jul	3, 1933	160.00
Jan	23, 1933	404.70	July	7, 1933	225.00
Jan	25, 1933	140.80	Jul	8, 1933	90.15
Jan	30, 1933	336.30	Jul	12, 1933	204.00
Feb	1, 1933	110.55	Aug	14, 1933	425.00
Feb	6, 1933	278.40			[557]

E. B. CLAYTON

E. B. Clayton, defendant's witness, being first duly sworn testified:

Direct Examination

I have been a motion picture operator and electrician for about ten years, mostly employed in Seattle with the John Dane Theatre Company; I have had experience in installation of sound equipment through a firm that manufactures them in Seattle and I have studied up on the subject through books and magazines; I have been employed as installation engineer for a sound equipment concern for about two years; I first met Defendant Gross around December, 1929; I know what is meant by servicing equipment when that term is employed by those engaged in the sound equipment business or the motion picture business generally:

“Q. Will you tell us what is meant by that term when it is so used by people so engaged?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial, an attempt to vary the terms of a written instrument.

The COURT: He may answer.

Mr. ROBERTSON: Exception.

A. ‘Service’ to us, means to go out into a house where the equipment is out of repair and put this equipment back into repair. That is what we call service. Inspection and minor adjustment.

(Testimony of E. B. Clayton.)

Mr. ROBERTSON: He didn't ask about inspection and minor adjustment. Same objection.

The COURT: Same ruling.

Mr. ROBERTSON: Exception.

A. Inspection and minor adjustment—we go into a theatre and look over the equipment that is in repair, look over the equipment, make a few minor adjustments and inspect it and see it is in proper shape so in case there are some small troubles it won't be large enough to shut the equipment down altogether."

Thereupon Witness Clayton further testified: I entered defendant's employ in May, 1930; I was to take care of service on sound equipment they had in the small towns and I was operator of his Haines Theatre; I was designated as service man for defendant's Ketchikan and Juneau Theatres if the operators in those two towns were unable to fix their trouble I would be called on to come down and rectify it; I was never called on. [558]

Cross Examination

Thereupon Witness Clayton further testified: I was engaged in installing Masterphone Sound Equipment for about two years previous to 1930 in Seattle, and prepared myself on Richardson's Handbook and electrical books, and whenever the Radio Monthly Digest came out I would read up on those and I had a set of Hawkins' Electrical Books and

(Testimony of Harold L. Stabler.)

numerous trade books during that time; I remained in defendant's employ for about two years, from May, 1930, until about the first of 1932. [559]

HAROLD L. STABLER

Harold L. Stabler, defendant's witness, being first duly sworn, testified:

Direct Examination

I am a public accountant, having had extensive study and experience over about six or seven years and employed as such and engaged in the business; I know defendant Gross and Witness Tuckett and I am familiar with the Juneau Coliseum Theatre; I assisted Tuckett in preparing these statements, exhibits Series I and K, which are a series of work sheets which I worked up with the assistance of Tuckett who was familiar with the books of the Coliseum Theatre; he furnished me with these figures; these check books, exhibits H-1 to H-7, both inclusive, are books of original entry of the Juneau and Ketchikan Theatres and the Alaska Film Exchange and I am familiar with them; these exhibits, Series I and K, were prepared by taking these books of original entry, exhibits H-1 to H-7, both inclusive, going through them carefully, checking over item by item and extracting the Coliseum Theatre expenses only; we extracted the items of expense concerning the Coliseum Theatre in these books and worked them on the work sheets; against

(Testimony of Harold L. Stabler.)

that we checked the gross receipts and arrived at the net profit and loss for each individual month. We then took each year separately and worked up an average monthly profit or loss for the year, and in going over these items from the book of original entry here we were very particular to pick out on the Coliseum Theatre Juneau and the Coliseum Theatre expenses of Ketchikan; those books contain many items not pertaining to those two theatres; we were very careful in the work: I should say that exhibits Series I and K with their appendant members are very closely accurate, mathematically as accurate as possible; this book, defendant's exhibit H-2, is a combined day book, cash journal, and checking journal and also contains the elements of a ledger; all kept in one book; defendant's exhibit W for identification is a report of the average profit and [560] loss statement for the Ketchikan Coliseum Theatre, taken from Shearer's reports offered in evidence, and shows an average loss of \$273.73 for May and June, 1933, an average profit for July, 1933, to December, 1934, of \$629.70.

Whereupon defendant's exhibit W for identification was offered in evidence, to which plaintiff objected on the ground that it was incompetent, irrelevant, and immaterial, and not the true measure of damages, which objection was overruled, to which ruling plaintiff then excepted. Whereupon said document was admitted in evidence, marked

(Testimony of Harold L. Stabler.)

DEFENDANT'S EXHIBIT W,

and reads:

AVERAGES AS PER SHEARER'S REPORTS

Coliseum Theatre—Ketchikan, Alaska.

		Loss	Profit
May	1933	203.68	
June	1933	343.79	
		547.47	

\$ 547.47 divided by 2 273.1/2—Average Net Profit.

July	1933		\$ 177.94
Aug.	1933	\$ 60.92	
Sept.	1933		856.49
Oct.	1933		242.12
Nov.	1933		315.69
Dec.	1933	414.92	
Jan.	1934	108.18	
Feb.	1934		114.37
Mar.	1934		778.97
Apr.	1934		470.91
May	1934		838.14
June	1934		380.20
July	1934		1041.64
Aug.	1934		1222.76
Sept.	1934		1798.96
Oct.	1934		1621.76
Nov.	1934		1555.52
Dec.	1934		503.15
		\$ 584.02	\$11918.62
			584.02
			\$11334.60

\$11334.60 divided by 18 months \$629.70—Average Profit per month over a period of 18 months, from July, 1933, to December, 1934, inclusive.

(Testimony of Harold L. Stabler.)

Thereupon Witness Stabler further testified: Defendant's exhibit W-1 for identification is the average profit and loss statement for the Juneau Coliseum Theatre, taken from Shearer's reports and separates the first two months of May and June and [561] averages the other months.

Thereupon defendant's exhibit W-1 for identification was offered in evidence, to which plaintiff objected on the ground it was incompetent, irrelevant, and immaterial, and not the true measure of damages, which objection was overruled, to which plaintiff then excepted. Whereupon said document was received in evidence marked

(Testimony of Harold L. Stabler.)

DEFENDANT'S EXHIBIT W-1,

and reads:

AVERAGES AS PER SHEARER'S REPORTS

Coliseum Theatre—Juneau, Alaska

		Loss	Profit
May	1933	\$ 50.56	
June	1933	164.64	
		<hr/>	
		\$ 215.20	

\$215.20 divided by 2 = \$107.60 = Average Net Loss.

July	1933		\$ 521.85
Aug.	1933	\$ 349.42	
Sept.	1933	324.73	
Oct.	1933	549.49	
Nov.	1933	207.06	
Dec.	1933	559.74	
Jan.	1934	178.05	
Feb.	1934	132.05	
Mar.	1934	319.49	
Apr.	1934	256.01	
May	1934	222.15	
June	1934	737.58	
July	1934	476.66	
Aug.	1934	69.81	
Sept.	1934		173.52
Oct.	1934	499.78	
Nov.	1934	350.50	
Dec.	1934	80.00	
		<hr/>	
		\$ 5312.52	\$ 495.37
		495.37	
		<hr/>	
		\$ 4817.15	

\$4817.15 divided by 18 = \$267.62 Average Net Loss
for period of 18 months.

(Testimony of Harold L. Stabler.)

Thereupon Witness Stabler further testified: Defendant's exhibit W-1 shows an average loss of \$107.60 in May, 1933, and the average loss between July, 1933, and December, 1934, is \$276.62, per month; the average loss for May and June, 1933, for [562] the Ketchikan Theatre shown on defendant's exhibit W is \$273.73½, and the average profit for July, 1933 to December, 1934, is \$629.70 per month; Defendant's exhibit W-2 for identification is a profit and loss statement for the Ketchikan Coliseum Theatre covering two periods from June 1, 1929, to May 1, 1931, and from May 1, 1931, to May 1, 1933, showing the average monthly losses or profits and the difference between the average for those two periods.

Thereupon defendant's exhibit W-2 for identification was offered in evidence, to which plaintiff objected on the ground it was incompetent, irrelevant, and immaterial, and not the true measure of damages, which objection was overruled, to which plaintiff then excepted, whereupon said document was received in evidence, marked

(Testimony of Harold L. Stabler.)

DEFENDANT'S EXHIBIT W-2,

and reads:

Coliseum Theatre
Ketchikan, Alaska

STATEMENT OF LOSS

\$2476.96	Average monthly profit June 1, 1929 to May 1, 1931 (23 mths)
187.55	Average monthly profit May 1, 1931 to May 1, 1933 (24 mths)
<hr/>	
\$2289.41	Average loss per month.
\$2289.41	multiplied by 24 months equals \$54945.84
	—Total loss before depreciation.

Summary:

Average monthly profit from June 1, 1929 to May 1, 1931 period during which Erpi equipment was installed (23 mths)	\$ 2476.96
Average monthly profit from May 1, 1931 to May 1, 1933 period during which Erpi equipment was NOT installed (24 mths.).....	187.55
Average monthly loss during period between removal of Erpi equipment and Shearer lease.....	2289.41
Total loss during 21 months period between removal of Erpi equipment and Shearer lease.....	48077.61

* * * * *

(Testimony of Harold L. Stabler.)

THE FOLLOWING RESULTS ARE FIGURED AS ABOVE WITH THE EXCEPTION THAT DEPRECIATION IS CONSIDERED.

\$2000.52 Average monthly profit June 1, 1929 to May 1, 1931 (23 mths)

187.70 Average monthly loss May 1, 1931 to May 1, 1933 (24 mths.)

\$2188.22 Average loss per month.

\$2188.22 multiplied by 24 months equals \$52517.28
—total loss after depreciation.

Summary:

Average monthly profit from June 1, 1929 to May 1, 1931 period during which Erpi equipment was installed (23 months.)\$2000.52

[563]

Average monthly loss from May 1, 1931 to May 1, 1933 period during which Erpi equipment was NOT installed24 mths. 187.70

Average monthly loss during period between removal of Erpi equipment and Shearer lease..... 2188.22

Total loss during 21 months period between removal of Erpi equipment and Shearer lease..... 44952.26

(Testimony of Harold L. Stabler.)

Thereupon Witness Stabler further testified: The average monthly profit for the period of June 1, 1929, to May 1, 1931, 23 months at the Ketchikan Theatre was \$2,476.96, without depreciation, and between May 1, 1931, and May 1, 1933, 24 months, was \$187.55, without depreciation; and the difference between the two periods was \$2,289.41, that constituted the average loss per month, which, multiplying \$2,289.41 by 24 would be \$54,945.84, the total loss during May 1, 1931 to May 1, 1933, before depreciation is taken; that summary following that statement shows the average monthly profit from June 1, 1929 to May 1, 1931, or a period during which plaintiff's equipment was installed, 23 months, average profit of \$2,476.96, and average monthly profit from May 1, 1931, to May 1, 1933, during which plaintiff's equipment was not installed, 24 months, of \$187.55; average monthly loss during the period between the removal of plaintiff's equipment and the Shearer lease \$2,289.41, also gives a total loss during the period between removal of plaintiff's equipment and the Shearer lease, total loss of \$48,077.61, before depreciation was taken; it also shows the figures after depreciation had been taken, namely average monthly profit, 23 months, from June 1, 1929, to May 1, 1931, \$2,000.52; average monthly loss from May 1, 1931, to May 1, 1933, 24 months \$187.70; average monthly loss during period between removal of plaintiff's equipment and Shearer lease \$2,188.22; total loss during 21 months, the period between removal of plaintiff's equipment and the Shearer lease \$44,-

(Testimony of Harold L. Stabler.)

952.62 after depreciation; I don't know why this figure is 21 months rather than 24 months; that is the figures you gave me; defendant's exhibit W-3 for identification is a statement of loss covering the Juneau Coliseum Theatre, similar to previous exhibits, but showing different figures. [564]

Thereupon defendant's exhibit W-3 for identification was offered in evidence, to which plaintiff objected on the ground it was incompetent, irrelevant, and immaterial, and not the true measure of damages, which objection was overruled, to which ruling plaintiff then excepted: Thereupon said document was received in evidence, marked

DEFENDANT'S EXHIBIT W-3

and reads:

Coliseum Theatre—Juneau, Alaska

STATEMENT OF LOSS

\$1404.46 Average monthly profit May 1, 1929 to
May 1, 1931 (24 mos)

64.17 Average monthly profit May 1, 1931 to
May 1, 1933 (24 mos)

\$1340.29 Average loss per month

\$1340.29 multiplied by 24 months=\$32166.96—
Total loss before depreciation

Summary:

Average monthly profit from May 1,
1929 to May 1, 1931 period during
which Erpi equipment was installed
(24 mos.)\$ 1404.46

(Testimony of Harold L. Stabler.)

Average monthly profit from May 1, 1931 to May 1, 1933 period during which Erpi equipment was NOT installed (24 mos.)..... 64.17

Average monthly loss during the period between removal of Erpi equipment and Shearer lease..... \$1340.29

Total loss during 21 1/3 month period between removal of Erpi equipment and Shearer lease.....\$28592.85

* * * * *

THE FOLLOWING RESULTS ARE FIGURED AS ABOVE WITH THE EXCEPTION THAT DEPRECIATION IS CONSIDERED.

\$864.15 Average monthly profit May 1, 1929 to May 1, 1931 (24 months)

489.98 Average monthly loss May 1, 1931 to May 1, 1933 (24 mos.)

\$1354.13 Average loss per month.

1354.13 multiplied by 24 months equals \$32499.12 total loss after depreciation

Summary:

Average monthly profit from May 1, 1929 to May 1, 1931 period during which Erpi equipment was installed (24 mos.) \$864.15

(Testimony of Harold L. Stabler.)

Average monthly loss from May 1, 1931 to May 1, 1933 period during which Erpi equipment was NOT installed (24 months).....	489.98
Average monthly loss during period between removal of Erpi equipment and Shearer lease.....	1354.13
Total loss during 21 1/3 month period, (with depreciation considered) between removal of Erpi equipment and Shearer lease.....	\$28888.10
	[565]

Whereupon Witness Stabler read defendant's Exhibit W-3 to the jury.

Cross Examination.

Thereupon Witness Stabler further testified: Those exhibits W, W-1, W-2, and W-3, were made last night and were compiled from the average profit and loss statements, defendant's exhibits Series I and K, and the Shearer figures were taken from the Shearer statements: I have no personal knowledge of any of the facts or figures contained in any of those exhibits or of the figures in defendant's exhibits Nos. H-1 to H-7, both inclusive; I could say that the yellow work sheets were taken by Mr. Tuckett and I actually from the books and from those checks we compiled the rest; I never had anything to do with the keeping of those books,

(Testimony of Harold L. Stabler.)

exhibits H-1 to H-7, and never made any entries in them; the first time I ever saw them was the first few days of this trial; I know nothing about them except as appears from the face of the books themselves and what Tuckett told me; that type is usually known as books of original entry, but as far as whether it is a book of original entry I was not a witness, I was not there when the entries were made; that part of exhibit H-6 for the month of September, 1929, sort of lined off with columns headed "Receipts for month of September, 1929, \$6,682.75, and below "Paid out for month of September, 1929, \$4,513.97"—all the figures on that page could constitute a part of a journal because a journal is generally a segregation or compilation of the month's figures; wherever in those books the pages are ruled off and lined and segregated in that same manner, it may be considered as a journal, also straight explanatory remarks in a book of that sort may be considered as a journal; that is the part of it that I would call the journal; it wouldn't be entirely wrong to call it in part a ledger because these checks are all carried; if there had been an elaborate set of books carried down there, each check in this book would have been carried through the journal and into the main ledger; I have not seen a ledger; everything is carried for income tax, work and everything; it is a set of books itself, in the form of a record, I [566] believe in the form of a record; I believe I saw the records also; I have

(Testimony of Harold L. Stabler.)

not had occasion to go into anything further than these books; there must be some record further. I might [567] say any of these entries could be carried forward and called ledger entries; there is not a bound book, set of books, down there, jotting them down on some other piece of paper and made into ledger form would be equal to the same thing; there is not a ledger in these books themselves; I don't know whether I saw some other sheets down there where those items were carried forward which have not been produced in the court room, but I saw some sheets pertaining to items in these books, but I believe everything I saw down there in the form of books, the figures have all been compiled from those; the information in this book is carried forward in part of the Colesium theatre at Ketchikan and Juneau, showing receipts and expenditures, carried forward into their profit and loss statement and that profit and loss statement constitutes part of their books; there is also other expenses covering apartment house business too; I recognize those exhibits Series I and K; no books, records or documents were used in preparing them other than those exhibits H-1 to H-7; copies of defendant's income tax returns were the basis of and used for some of the figures in preparing defendant's exhibits Series I and K in the preparation whereof we excluded numerous certain items shown in exhibits H-1 to H-7; nobody except Tuckett told me to exclude them; I had no personal knowledge

(Testimony of Harold L. Stabler.)

as to whether or not they should be excluded; I have no personal knowledge of the books at all; I don't know when the strike-outs, appearing at the top of the page headed April, 1931, in defendant's exhibit H-3 were made; I don't know when those figures in blue lead pencil, \$3,042.83, were put on there; I didn't see it done; the lead pencil figures in that same exhibit on the page marked "Receipts for month of January 1931," were not made by me; I don't know whose they are; I didn't make them when checking the book over with Tuckett; I don't know when the corrections or strike-outs were made on that page; I don't know when the check-marks in red and blue pencil were put in exhibit H-7 on the page headed "Cash in Bank for December, 1932, \$1,035.31." I made no marks in this book whatever and didn't see any made at any time; Tuckett was making some marks [568] as he went along, but so far as I know they were only check-marks; I don't know what marks he was making in the books at that time; I was first employed by defendant the first day of the trial or one of the first days; I had never been in his employ prior to helping Tuckett compile these various statements that have been introduced as exhibits; I am not a certified public accountant; my chief business right now is the brokerage business and business accounting on the side; as nearly as possible we checked back all the additions and various figures on defendant's exhibits Series I and K; as

(Testimony of Harold L. Stabler.)

nearly as humanly possible we got them correct; defendant's exhibit K-3 is a profit and loss statement of the Juneau Coliseum Theatre for January 1931, to December, 1931, showing general receipts—

A. Receipts \$3,347.41, for January.

Q. What expenses?

A. Total expenses \$3,206.23.

Q. What does it show for profit or loss?

A. Shows net profit \$161.18.

Q. What does it show for February?

A. February \$3,078.58 receipts.

Total expenses \$4,488.26; net loss
\$1,419.58.

Q. What does it show for March?

A. March \$3,059.95 total receipts; \$2,902.00
total expenses; profit \$157.95.

Q. What for April?

A. April \$3,042.83; \$3,295.86 for total ex-
penses, or a net loss of \$253.03.

Q. That was for 1931?

A. First few months of 1931, yes sir. [569]

LOUIS LEMIEUX,

defendant's witness, being first duly sworn, testified:

Direct Examination.

I am familiar with defendant's Juneau and Ket-
chikan Theatres; I know defendant and have been
in his employ from January 1, 1926, until the

(Testimony of Louis Lemieux.)

present date; I live in Juneau; I was in Juneau when sound equipment was installed in defendant's Juneau Theatres, about the middle of May, 1929, and met Taylor, plaintiff's sound and installation engineer; I took instruction from him in the operation, repair, and upkeep of sound equipment, by starting in unpacking and checking all the different parts of the equipment, consisting of about forty boxes and cases and then proceeding to learn the names of the various parts and what they were for, Taylor instructing us on that part of it. We went ahead and installed the machines, with Taylor doing practically all the work so we would know more about the assembling and operation of the machines after they were set up; also he gave some instructions as to the operation and function of the amplifier; aside from that we were issued a book from plaintiff quite extensive operating instructions; about six months later I sent to New York for Richardson's Handbooks on operation, three volumes, costing about \$11.00 at that time; practically all operators make the investment of these books at one time or another; at that time Richardson issued a book on sound which we considered very valuable and bought it; I didn't go to Ketchikan at that time; Taylor stayed in Juneau a week or so after the installation, then he went to Ketchikan and installed there, after which he returned to Juneau and I saw him here in Juneau in the early part of July, 1929; I know Witness Wilcox, met him

(Testimony of Louis Lemieux.)

in July, 1929; I was present when Wilcox, Taylor, and Gross had a conversation in the booth at the Coliseum Theatre; there was quite a bit of conversation; Wilcox sat in the auditorium the first time and listened to the sound; we put on reproductions of both the disc and film so he could hear the difference between the two; [570] he visited the operating room where we were introduced to him by Taylor, as head of the Service Department of the Western Division; at that time Taylor had been two months in Alaska; the weather was fine but he was anxious to get away so he could enjoy good weather at his home wherever he lived; he expressed a desire to return home so he could enjoy the summer weather; Wilcox told him then, if he thought he had the equipment in good running order, he could leave because Gross had no service and there was nothing to stay for; I remained in Juneau two or three months, then I left for Ketchikan in August, 1929, and was there in September, 1929; I took care of the equipment in Juneau after Taylor left, Tuckett being at that time in Ketchikan; I don't remember Albright; I remember Knowlton; some of the service engineers stayed for such a short time that I can't remember them completely now; in looking over the service reports I recognize the names but couldn't testify anything pertaining to them; most of them came through on the boats and visited while the boats were in ports; Knowlton was the only one we had a real visit with at that time and I got very well acquainted with him.

(Testimony of Louis Lemieux.)

After I went to Ketchikan, myself and operator took care of the Ketchikan equipment; none of the service men ever did anything in the way of repairing or keeping that equipment in repair; they used to come in, present their credentials for identification, asked if we had any trouble during the period we were alone; if so, we would tell them what it was, if not they would go over the machines in a sort of inspection; if they found nothing wrong they did nothing, if they found anything wrong they would tell us what necessary adjustments to make, but they very rarely made any adjustments themselves, the operator and myself working with them on the inspection made them; we inspected the machinery about an hour before the show each night; if minor adjustments were necessary we made them at that time; if the machine showed any trouble, the next day we made the inspection early so we would have it fixed by evening; if things ran right we wouldn't start our inspection until about an hour before the show; some of these [571] service engineers found minor adjustments to make because at that time we were running the machines pretty hard, especially in Ketchikan. I did all the previewing for the circuit; I looked over every reel of film that came on the steamers on each shipment from Seattle; besides running the regular show four or five hours, I had the preview after midnight of pictures to be shown the following week, giving the machines 2 or 3 hours more service at night; the reason the

(Testimony of Louis Lemieux.)

engineers found minor adjustments necessary was that they would come in the next morning after the previous night's run; if any of the tubes were weakened in the machines they would generally show up after that long run; the fact was we could find those minor adjustments ourselves on the next try-out of the show, just as well as the engineer could do it; but we didn't look for them until evening unless we had trouble or had to change the sound or something.

The engineers compared more to our weekly inspections, when we started right at one end of the equipment and went through to the other end, that is we tightened up on the machines, there is quite a few set screws liable to work loose through vibration; I used to have the operator go over them once a week thoroughly; all the tubes were cleaned, all the prongs on the tubes where they contact the equipment, were cleaned, and all the rheostats connected with the sound; we went backstage and cut out the speaker units and inspected the horns; our inspections on Saturday lasted from about eleven in the morning until about three or four in the afternoon, during which we went over the machines as thoroughly as we knew how; we did that once a week in addition to our daily inspection.

Taylor was in Juneau once right after the installation when I had fader trouble, but none of the service engineers were ever here after that when I had trouble, which was on two or three different

(Testimony of Louis Lemieux.)

occasions and myself and operator fixed it; at one time the motor control box didn't work and the machine that controls the speed of the motor; it worked the night before and the next day the operator discovered the left-hand machine didn't run, which meant we could only run one machine, which is very dissatisfying to the [572] audience, making a wait of a minute or a minute and a quarter between each reel; operator Ralph Bontrager fixed that under my supervision; another time during the night we got a very pronounced hum in our equipment so after experiments and trials and eliminations we found the trouble in the ground in this box Lawrence tested; we tried another ground on it and it gave us the same noise as usual, but so long as we had the ground disconnected the noise stopped when we would turn on the sound; so then we went to the back end of the building with a wire and put another ground on it and finally got a ground that would work on it and left it that way until the engineer, Foulon, came up two or three weeks later and he did the same thing, a different ground on the equipment; I don't know what effect the absence of a ground would have, it might overload some of the parts and in case of leakage of electricity somewhere in the circuit I imagine the safety factor would be eliminated; the effect on sound reproduction was no different in the quality of sound without the ground but the hum was remedied; if we hadn't taken the ground off entirely

(Testimony of Louis Lemieux.)

and left the hum we could not have run the show; the service engineer made an inspection and visited us but not at the time of the trouble; I might have been able to have gotten in touch with one but I knew he would not have got there to help us, so I didn't even bother to telegraph.

We also had fader trouble; I had Taylor work on it and he was anxious to get to Seattle and never repaired it and left instructions with me if it kept on doing that to send it to Seattle and get another fader and install it; that was the day he left; after he left I went to the operating room; there was quite a bit of trouble on the next showing; I went to the operating room and discovered the trouble myself and had an electrician come over and solder a broken wire; one of the connections was broken; I found a broken wire and had the light company man solder it; there was no other engineer in sight.

Neither Lawrence nor any other engineer left with me schedules as to where they would be; I know inspection engineer Smith [573] and remember when he called, mainly by his condition, as he was very inebriated or intoxicated; he made a social call with some friends he was travelling with on the boat; he gave me quite a bit of trouble because the boat stayed in Ketchikan sixteen hours; he was there most of the time; in his condition he wasn't a very efficient engineer and he went through the whole house at high speed; told me my troubles and naturally wanted his service slip signed, which

(Testimony of Louis Lemieux.)

I did for him more out of form than anything else; after he inspected the equipment he asked me where he could find a bootlegger; that is all I saw of him until he came back to see the preview at three o'clock in the morning; he looked over the whole theatre, took a look at the horn towers to see if they were set satisfactorily for sound, came to operating room, got acquainted with the operator and asked if everything was operating all right, which it was; that was about the extent of his inspection; he was on his way that time to install the Lathrop circuit in Western Alaska; he didn't stop any longer than the boat was in Ketchikan; that is the only time I saw him.

I wrote this undated letter on behalf of defendant to plaintiff from Ketchikan about September, 1929.

Whereupon undated letter written by Witness Louis Lemieux in behalf of defendant to plaintiff was received in evidence, marked

DEFENDANT'S EXHIBIT V,

and reads as follows:

L. C. LEMIEUX
Resident Manager
Ketchikan

Electrical Research Products, Inc.,
New York.

We received today by mail, statements for weekly service from your company at the rate of \$29.75 a week for each of our theatres at Juneau and Ketchikan, Alaska.

(Testimony of Louis Lemieux.)

Mr. Gross is on his way East with Mrs. Gross, and in looking over our contracts can find no confirmation as to our being charged for weekly service as we do not use sound every day in the week.

Our contract shows plainly that we should not be charged for service, and I may add that the price of talking pictures [574] for this territory is so high that extra expenses are too much for us to pay. We have first class men here and whenever anything goes wrong we can find the trouble ourselves.

The only agreement we had is that if anything goes wrong with our equipment we would pay the expenses of a service man coming up to this territory from Seattle, Wash.

Pictures at present are too high to buy and therefore we are laying low on sound.

Hoping that you realize the way we are situated and if there is any dispute as to further service charges, kindly write the manager of the Coliseum Theatre, at Juneau, Alaska and he will forward same to Mr. Gross.

Respectfully yours,

(Signed) L. C. LEMIEUX

Mngr. Coliseum Theatre.

Ketchikan, Alaska.

Thereupon Witness Louis Lemieux further testified: Most of the service engineers prior to Witness

(Testimony of Louis Lemieux.)

Lawrence went through on the boat; I couldn't say how many stopped off at Ketchikan because there were probably four or five during that period between Lawrence and Taylor, but most of them were there just during the time the boat was in port from half an hour to two hours; the lesser troubles that occurred were such as tubes burning out, going dead, one thing another; we changed them when necessary, fixing them ourselves.

Cross Examination.

Thereupon Witness Louis Lemieux further testified: The four or five service engineers who called between Taylor and Lawrence all served their reports upon me and I receipted for them; I don't even remember the names of very many of them; I remember Smith quite well as he was pretty drunk when he came down; I saw him at Ketchikan; at that time he was going to the westward to install talking equipment in Captain Lathrop's theatres; I couldn't say what day it was but along in the winter of 1929 or fall, between November, 1929, and January, 1930; that is as close as I can come; I never saw him again; I was then working in Ketchikan; I am now working as care taker of defendant's apartment houses and am not employed in his theatre at all and have had nothing to do with the theatres since about August, 1932, or 1931, I don't remember, a year and a half ago anyway; I came from Petersburg to Juneau; when the equipment

(Testimony of Louis Lemieux.)

was being installed I and Witness Tuckett actually did the work, but Taylor directed it by which I mean that we packed [575] in the bases which weighed about 250 pounds, which involved nothing technical, and set up the machines; I made up out of wood an adapter for the lamp house; we set the machine up, first putting the base down and leveling it up, then started putting on the lower parts, fastened the legs to the bolts, bolted the turntable down; fastened the amplifier; that was all done with Taylor's directions; they had to be assembled together first and Taylor told us where the parts were; the disc was put on after it was set up; I don't remember the next part; I don't remember now whether the disc was the next part; I can't say what was the next part after that; I couldn't remember now how to set up the equipment after six or seven years; I didn't have anything to do with setting up the equipment in Ketchikan; Tuckett and I each bought three volumes of Richardson's Handbook, which is a sort of operator's bible; I gave mine to Bontrager when I left Ketchikan in 1930 or 1931 and haven't had one since.

In that conversation when I was present Witness Wilcox said Taylor could just as well go home, back to the States as he thought he had the equipment running in such shape that he could leave it; Gross had no service and it wasn't necessary for him to stay here any longer; that wasn't the total conversation. Wilcox spoke to Gross afterwards

(Testimony of Louis Lemieux.)

when I was present and explained to Gross how in case of necessity we had good transportation up here and airplane at that time and planes could be chartered to come up here; in case he had trouble he could telegraph to Seattle for an engineer to come up and take care of it; that is the conversation as to the equipment; Wilcox was interested in the boys, myself and operator at the time; he wanted to know how we were getting along, how we liked the equipment; the equipment was doing pretty well at that time; present at that conversation were Taylor and my brother, Ned Lemieux, Gross and myself, and I believe we were breaking in a new operator at the time and he was in the operating room.

When a service engineer came to wherever I happened to be stationed, either Ketchikan or Juneau, I and my operator both went right around with him to see what he was doing; that was true of [576] practically all the service engineers who came here; I couldn't say that I looked over and receipted all those service reports; there might have been one or two I left to the operator; I don't recall whether Ralph Bontrager signed one for me or not, but he could do it under my authority; Taylor gave me a pretty good course of instructions as to operating the machines, spending a week or so in Juneau after he returned from Ketchikan, and Knowlton gave us very good advice, but from that time on the engineers' advice was only in case of certain

(Testimony of Louis Lemieux.)

trouble, we talked it over with them, explained it to them, and then they would advise us on the parts we asked for information; Lawrence also gave me instruction; he and Foulon were both good engineers.

I make a distinction between the daily inspections I made when I went around to oil the machines and the weekly inspections that I and my operator made: it required about three or four hours to make the weekly inspection which we called our Saturday's job and which was about the same kind of inspection or service that the engineers gave the equipment when they came around; when I fixed this motor control box, Ralph Bontrager did the work under my supervision; I don't take the credit away from Bontrager, he was a good electrician and had a good deal of radio experience; I would say that he, so far as following the electric circuit, was more efficient than I, but he did the work under my supervision and I considered myself competent to check, test or ascertain what was the matter at that time, or to check any of the Western Electric Talkie Equipment; there are some troubles I don't believe I would be able to find in two or three months; anything in the circuits back of the transformer would be easier for Bontrager to figure out than for me, having had experience with those kinds of electrical circuits and hook-ups.

Bontrager and myself tested the motor control box trouble to see if there were any shorts or breaks

(Testimony of Louis Lemieux.)

in the circuits, that is any loose connections, couldn't find any; I couldn't tell now how to go about to test them out and I know of no particular way that they could be tested in a hurry, but our best system is elimination [577] and experiments; we were lucky the job didn't last longer; we found a thread of solder about that long (indicating a very short length) that had jiggled down from vibration from some other part we overlooked when the connections were soldered during installation; I couldn't say when the trouble occurred; it might have been in December, 1929, I couldn't say; the motor didn't run at all; I know of a simple method by which variations in the speed of the motor can be corrected but anything like that I used to leave to my operator, Ralph Bontrager, who I believe, but am not sure, is now in Wrangell; he would tell me what it would take to fix it and we would figure it out between us to see if his system was any good; whether or not I could fix it myself depended upon what it was; we always worked together on trouble in the operating room; we had a pronounced hum in the horns but couldn't find any reason for it in the tubes or pre-amplifier or main amplifier; we went all over it trying to find the trouble; I don't know what tests we did apply; that was quite a long time ago; I haven't had any experience since that time on Western Electric equipment; it has been off my mind; it would be hard for me to say what would be the common ordinary test to apply to

(Testimony of Louis Lemieux.)

ascertain that, for the reason that we only had one trouble like that; we discovered the trouble was in the ground; it must have been approximate to some other disturbing element whereby the trouble would pass into the ground; the trouble was outside the machinery in the house; we ascertained it was in the ground by trying the ground in three or four different places and finally found one where the noise was absent; Bontrager assisted in that; two dumb-heads are better than one; it took both of us to do it; I really don't know what the absence of a ground would do not being technical enough; I know all electrical equipment usually has a ground.

Taylor was still here when we had the fader difficulty; he worked about two days on it himself; we ascertained the trouble which was quite serious, he left with us in the fader by another [578] experiment; in the construction of the fader in the back there, I believe, if I remember right, there is a bakelite place, insulating plate in the back; everything on the fader is built to that. There is a round disc about three inches, and outside of that a row of contact buttons, and on the control handle there is what you call fingers, one touching the plate, one the contact button as it moves around. There is a soldered connection on the three-inch round plate in back outside the fingers so it won't touch them in going by. There is quite a bit of pressure as you turn the control handle and when you get the handle in a certain position it would push the plate

(Testimony of Louis Lemieux.)

away from the soldered position thereby killing the sound altogether; the soldered connection looked all right, you could not tell it wasn't good; I had the point of a pencil in there trying to make the sound appear and disappear by my own means, instead of by the control handle; the lead on the pencil carried electricity and when it touched the soldered connection the sound came in because the lead made contact and let the sound in; that was my trouble, it wasn't very technical; an engineer would not have done it that way; we were pretty lucky in all these troubles; I imagine that a technical man would call the fader the sound rheostat but it was a fader to me; it was the thing that controls the volume of sound, the same as on a radio set when you make it louder or softer; it is too deep for me to state whether or not a variable resistor can be used in a series between the pick-ups in connection with that operation; Bontrager did not help me fix the fader; at that time we were pretty nervous about the equipment; it was something new to us; Schombel had an electric crew in installing and I went and got his advice about it; it took him as long to fix it as it took to get a wire hot, being a very simple matter when I finally located it.

I was in Ketchikan for, I imagine, nineteen months as manager, from August, 1929, to January 1931; during that time I wrote the letter, defendant's exhibit V, some time the latter part of September, at which time I was running sound pictures

(Testimony of Louis Lemieux.)

four nights a week and silent pictures the other three nights, which we kept up for another five or six months when we got lined up with other companies besides Warner Brothers for sound pictures, having at first contracts only with Warner Brothers; it is true that the expenses at that time were too big for me to pay \$29.75 because picture shows are always broke; I would say that that statement in that letter is actually true; because when I looked at the bill I was thunderstruck; I wouldn't have written the letter otherwise; I looked over a copy of defendant's contract, plaintiff's exhibit 3, previously when I was in Juneau, but I couldn't say now whether or not I read the contracts or got the dope through hearsay or where I got it; the big expense mentioned in that letter was film, which was [579] costing us about \$500.00 a picture but silents didn't cost that much; silents went down about a year later, about in September, 1930, we were paying \$500.00 for a sound picture at that time besides \$100.00 on copyrights on sound; we were taking in big receipts too, at that time; when our operators [580] learned to run sound we raised their wages; I believe the same month I went to Ketchikan Bontrager was raised from \$160.00 to \$175.00 I think I raised him first to \$175.00 and my salary when I took over the manager's job was raised to \$225.00 in August, 1929, it having previously been raised from \$150.00 to \$200.00; I don't remember just what other big expenses we

(Testimony of Louis Lemieux.)

had at that time or just what the operating expenses were; the janitor got \$175.00 or \$185.00 a month; Gross took care of the janitor's salary; the only funds I handled in Ketchikan was to make out my expense checks, which I drew on the Miners and Merchants Bank and then I would send them to Juneau with the explanation; of course the regular checks for wages, freight, light, and fuel were self-explanatory; in case I had extra expenses I would make out a check, explain to defendant in a letter what it was for, then after his signature was put on the checks in the book, that was in Juneau; then they were returned to me for distribution; I just drew all my checks and sent them here for signature and never had anything to do with entering them in the book or anything of that kind: I have not lately seen any of those letters of explanation of what those checks were for.

I used to make a weekly report and a monthly report to the Juneau office; all our correspondence was done in that manner unless something special came up in the meantime, having regular forms: I couldn't say whether or not all the Ketchikan weekly reports are in this bundle of papers, defendant's exhibit X; I didn't personally draw the janitor's check; I don't remember now what his salary was to the dollar; I know there was fluctuation in the salary all the time, in fact the only salary I personally knew of was my own.

When Knowlton was in Ketchikan he ran through a cycle film, which was a test reel made by plaintiff

(Testimony of Louis Lemieux.)

for the purpose of testing the response of the equipment to the different cycles of sound; I ran the film and Knowlton made the test; I would be able to run the film to make a test of sound; we had no film in stock for that purpose, and the special instruments Knowlton used in running the film, were furnished by plaintiff and tests couldn't be run without having those tools; I did know what those tools were but I [581] don't know whether I do now; I don't believe I could remember any of them; the voltage in Ketchikan was always fluctuating, never was normal; if high we didn't compensate for it in the motor control cabinet, the City Power put a variable rheostat on the main line, which we got from the Ketchikan Light Company; we didn't clean the screen every day, but once a month, every six weeks or whenever it was necessary; we didn't clean the film rheostat, the prongs, the vacuum tubes, or the contacts to the horn switch, or measure the photo electric cell battery voltage, or the battery of the photo electric cell amplifier every day; at the time I knew but I don't now know what the correct reading of the batteries of the photo electric cell amplifier should be; I really couldn't give any technical data in the way of testing tubes at this time, I have forgotten; I know at the time we ran the tube tests we had four tests on the different tubes to be sure they were functioning properly, but at this time I cannot tell what they were; checking the core between the pad rollers

(Testimony of Louis Lemieux.)

and roller pad assembly was not done daily but weekly; we tested this by putting a piece of film in the machine and rolling it to see if the proper tension was maintained in the pad, which was the way that plaintiff's equipment was checked; I don't remember the correct clearance; I don't believe I remember exactly what the setting was in the pad roller; we didn't check that every day or the 205-D tubes and amplifiers; I don't know now but did know the limit for those tubes, which information I got from the instruction book, and I would get quite a bit of information from Knowlton's inspections; I would say that focusing the exciter lamp alone would probably reduce machine noise a little, but machine noise through the exciter lamp is generally caused by an old lamp or broken filament; we refocused the lamps practically every day; they all don't get loose every day; I don't believe I ever had a case of a battery connection getting loose; it is a daily job to keep the machines wiped clean and see that there is no leakage, but the gear boxes would not be filled up every day, there was a plug inside of the case that you could test through; commonly nothing [582] gets loose in the fader; I never had anything get loose in the fader, but I had the trouble in the fader I previously testified to when Taylor was here, which was the only trouble we had in the fader aside from noises from dirt; we had to clean it practically every week.

(Testimony of Louis Lemieux.)

Redirect Examination.

Thereupon Witness Louis Lemieux further testified: Schombell was chief electrician at the Alaska Electric Light and Power Company where he was employed when I got him to fix the fader; at the time of the Wilcox conversation my brother, Ned Lemieux, was busy running the machines, in fact we were running them together; he took over the full operation of the machines while I talked with Wilcox; he was present at part of the conversation, I couldn't say how much; the other man was Mexie Cortez, but I couldn't swear whether he was in the booth at the time. He was then employed in the theatre and we were instructing him in the operation of the machines; I don't remember whether he was there that night, don't think he was, because after my brother came to work he was not in the booth very much; Knowlton had special equipment he carried with him to make certain tests but none of the other engineers had that equipment; none of the other engineers had any equipment that we were not supplied with right in the theatre; we having the same meters and supplies they had, Knowlton being the only exception;. [583]

LOCKIE McKINNON

Lockie McKinnon, defendant's witness, being first duly sworn, testified:

Direct Examination.

I live in Juneau; lived in Alaska nearly fifty years; I have known where the Coliseum Theatre was ever since it was built; I attended it during 1929, 1930, 1931, 1932, and 1933; I remember hearing of when the equipment was taken out of that theatre, but I don't remember the date; I used to go there right along both before and after; maybe once, sometimes twice a week.

Whereupon the following proceedings took place:

Q. Did you have occasion to notice the character of the sound during that period?

Mr. ROBERTSON: Object as incompetent, irrelevant and immaterial, no proper foundation laid for this line of questioning; that particular question I suppose could be answered "Yes" or "No".

Q. Did you notice the character of the sound, quality of the sound, before the equipment was taken out?

A. Yes.

Q. Was that good or bad?

Mr. ROBERTSON: Same objection.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

A. Well, it was good to what I was used to because it was the first talkie I ever heard. I thought it was good then.

(Testimony of Lockie McKinnon.)

Thereupon Witness McKinnon further testified: I went after the equipment was taken out, once a week perhaps, I don't know; I didn't go very often; I noticed the character of the sound after the equipment was taken out and the new put in.

Whereupon the following proceedings were had:

Q. What was it?

Mr. ROBERTSON: Same objection.

The COURT: Overruled.

Mr. ROBERTSON: Exception. [584]

A. Yes.

Q. Was it good or bad?

A. I didn't think the sound was as good, that is why.

Cross Examination.

Thereupon Witness McKinnon further testified: I couldn't say that I ever saw the same show after this equipment was taken out as I saw before; I don't recall that. [585]

NED LEMIEUX

Ned Lemieux, defendant's witness, being first duly sworn, testified:

Direct Examination.

I now live in Chilkoot Barracks, Alaska, having lived in Alaska ever since I was eighteen months old; I know defendant; I was employed in his Juneau Coliseum Theatre from May 17, 1929, to February

(Testimony of Ned Lemieux.)

26, 1930, when I was moved to Wrangell to take charge of his new theatre in Wrangell; I arrived in Juneau a week after the sound equipment was installed in defendant's Juneau Theatre, and was present for a short time while Taylor was here; I was in the booth when Wilcox, Taylor, Gross and myself were there; that is all that I remember; I couldn't hear their conversation; I was running the machines; we had both machines in operation, I was warming them up; there was so much noise I didn't hear any conversation; I don't remember any of the service men by name; they weren't around here long enough for me to get that familiar with them; I was operator of the Juneau Coliseum Theater during the entire time I was here, and I operated the machines every day during that time, approximately nine months; I was here when we had quite severe trouble on two different occasions and I was able to repair them at the time, although it took me some time to find the trouble, but a very short time to repair it; on the first occasion there was a short circuit in the pilot light of the disc circuit, about January 10, 1930, which was a job to find, but through the process of elimination I traced it down to this pilot light where two wires had come together and short circuited, which blew out a three ampere fuse, might have been a six ampere fuse, in the battery room, killing the entire equipment; we gave a show under those conditions, fortunately having film productions which we could run instead of disc productions; otherwise probably

(Testimony of Ned Lemieux.)

could have run on the other machine by inserting another fuse in the circuit and refrained from [586] throwing that switch on the disc side; we would have run the show but it would have been obnoxious to the customers however, and not satisfactory; we got it fixed, I repaired it, no service man being present or in sight, or that I could get to my knowledge.

The next trouble was approximately three weeks or a month later; the trouble I now have testified to was when Smith came up, whom I remember, Tuckett brought me a telegram, it was right after I repaired the pilot light trouble; the telegram was from Smith, said for me to meet him at the theatre at eight o'clock in the morning, so I went down to the theatre about six o'clock thinking he would come right up after the boat landed; he arrived at a quarter to nine and after having him identify himself, I let him in the booth, showed him where the trouble was; he didn't say anything but "Working all right now". I said "Yes, all right now, no trouble since". "That's fine." He turned around and walked out. When we got down to the foyer again he said, "I wish you would sign this report, I have to show that I have been here," so I signed the report and he said "I will fill it out on my way." That is the last I ever saw of him; he was on his way to install Lathrop's equipments in those theatres in the little towns to the westward; he told me he had the equipment on the boat and that

(Testimony of Ned Lemieux.)

they were going to install a service in Juneau and have spare parts and a man stationed here all the time and he was then on his way to Lathrop's and on his way South he was going to establish a distribution service point at Juneau, but he never did it; I guess he was in the house ten minutes not more; that was the last of Smith.

About three weeks or a month later there was a little service man here, whose name I don't remember; he shortened up the lead from the pre-amplifier to the photo electric cell; about a month later, in February, I think, he had shortened it up previously to when Smith came; he said it was picking up too much noise; it was unnecessarily long; he shortened it up but in splicing it together evidently didn't use a hot enough soldering iron and left an im- [587] proper connection in the solder and one night a noise came into the horn that was so bad you couldn't hear the talking at all; first I investigated the little connecting block that is in the cabinet that holds the photo electric cell, I tightened all the little thumb screws in it; I wiped the photo electric cell; finally I followed the lead down to where it hooked on to the connection in the pre-amplifier chamber, little connection I suppose to stop any vibration noises that occurred; I finally grabbed hold of that in my fingers, just grabbed it tight and the noise disappeared; so I figured I had traced down the trouble; I got a new piece of wire from the telephone company with

(Testimony of Ned Lemieux.)

the same core and same size and put it in there and re-soldered it in, and the trouble ended; no service man was here at that time and I don't know where any of them were; Smith was here and I believe that was the last one who came after that date; those 239 tubes gave us a lot of trouble; I believe they were supposed to give 100 hours and we used to have to change them every three or four days, they would get low; on another occasion the fuse controlling the circuit to the drive motor on the base of the equipment, blew out one night; there was a ten ampere fuse; I inserted a new fuse; it blew out again; I unfastened the drive and found it would turn freely by hand; I don't know what caused it to blow but corrected the trouble by inserting a larger fuse; before the show was over it was necessary for me to insert a fifteen ampere fuse.

Thereupon the following proceedings were had:

Q. Were minor, small adjustments necessary at any time?

A. We adjusted portions every night. I came to work at six o'clock every night, started warming the amplifier and making all the necessary adjustments, and tested the sound and horns before even a person came into the theatre.

Q. Tell the jury now just what you did every night, in the way of making inspection and minor adjustments?

(Testimony of Ned Lemieux.)

Thereupon witness Lemieux further testified: The first thing throw your service switch, then throw this switch herein into the plate and let it heat about 5 minutes; then throw it onto the filament, then you was in service after it warmed up; then I go [588] wash the machine down with clean rags and carbon tetrachloride, get it nicely cleaned, [589] take 20 minutes to wash down two machines; I come back and test the 239 tubes by pressing these buttons you get the filament on each one—you were allowed a slight variation five milliameters I think; then clean out the optical system, wash it down with carbon tetrachloride, dip pipe cleaners into carbon tetrachloride, then take another clean pipe cleaner and wipe them; wash this movie-tone aperture each night with carbon tetra-chloride; then throw my switch onto your film or disc side, film side is the way we did it; run my fingers up and down the aperture and test the sound and see you got sound in the horns; then test the exciter lamp. After got it all washed up and cleaned, you were ready to start the show. If you found a tube low, you changed it: every Saturday we made a weekly inspection, taking the housing off the fader, washed it down with carbon tetrachloride, going over the tubes with an eraser, cleaning the prongs, working them up and down in the sockets; we tested the tubes by taking one out and inserting another in the first socket, I don't remember just exactly how we did do it now, anyway the registration was to be at a

(Testimony of Ned Lemieux.)

certain point; we tested the 205-A tubes so as to keep them balanced as closely as possible; gave the machine a very thorough going over, working all set screws to see that they were tight, cleaning the machinery up extra good, and cleaning the fader; the fader had to be cleaned because if it was not you could hear the rasping noise in the horns when you turned the fader from one machine to the other

The weekly and daily inspections were of about equal importance, but the weekly inspections took longer to go over the entire equipment and clean up all those tubes.

Cross Examination.

Thereupon Witness Ned Lemieux further testified: I worked in defendant's Juneau Theatre from May 17, 1929, until about February 21, 1930, and then went to Wrangell, was in charge of his theatre and remained there two and a half months; then went to Sitka, built a new theatre there for defendant, taking charge of its construction; left Sitka August 17 and on September 1, 1930, [590] went to Haines in charge of defendant's theatre where I worked eight months, then went to work for the United States Government on July 1, 1931. I never worked for defendant in either his Juneau or Ketchikan Coliseum Theatres since about February 21, 1930; but I visited them on two occasions, putting up a new screen in the Juneau Theatre be-

(Testimony of Ned Lemieux.)

tween August 15 and September 1, 1930; I have never been in defendant's Ketchikan Theatre and never did anything in his Juneau Theatre after February, 1930, except putting up this screen that I mentioned.

Taylor had installed the equipment here and went to Ketchikan while he was there, I came to Juneau, receiving my first instruction on equipment from my brother Louis Lemieux; shortly afterwards Taylor came back here for a final inspection of the installation and I received further instruction from him but nothing further than in confirmation of what my brother told me; Taylor told us to make these daily inspections and we followed them explicitly; the Saturday inspections were always made regularly as our meals during the period from May 1, 1929, to February 1, 1930; we were always breaking in an operator here at Juneau; my brother, Louis Lemieux was manager of the Juneau Theatre for a month or six weeks after I arrived, then Tuckett was manager the rest of the time; I can't say that Smith was drunk at the time I saw him; he looked like he had a hang-over; that was the next day of the same trip of the boat that my brother Louis saw him in Ketchikan; he gave me a report which I signed and I have no copy of it and I have no idea whether defendant has a copy. I have not seen a copy since I arrived here to attend this trial; at that time I told Smith that the equipment was running O. K.; it was in pretty

(Testimony of Ned Lemieux.)

good condition right then, around about January 10, 1930; I would say between January 1 and 10, 1930; however, it wasn't running all right shortly before that, I just completed fixing it; that was the time Tuckett sent the wire to Briggs and got a wire from Briggs about it: [591] shortly after that there was some other trouble with the Juneau equipment, but I don't know anything of any other telegram being sent by Tuckett to Seattle; I don't remember hearing Tuckett testify about it; one of the troubles I testified to in the forepart of January, 1930, was the trouble on the disc side of the machine, the switch on the disc side blew out the fuses in the battery room, as naturally when a negative and positive wire in direct current come together so that you have a direct short circuit, it will blow the fuse; it took me one whole night and the next day to trace it down and I think at two o'clock in the afternoon of the next day I fixed it; that stopped the operation in the entire equipment of both machines; stops absolutely the main amplifier, putting the 41 amplifier out of commission; the lamp socket or whatever it was that was shorted or grounded was not on the same fuse as the photo electric amplifier but on a different one; so far as actually changing from a ten ampere fuse to a fifteen ampere fuse, there is no difference than changing from a lighter to a heavier fuse in a person's house; at that time I made an examination of the control box to find out whether a larger fuse was needed but found

(Testimony of Ned Lemieux.)

nothing wrong and I blamed it onto a surge of the line voltage; I changed again the next night to a ten ampere fuse and it worked all right; I don't know what "impedence" means; I know a regeneration circuit to a certain extent, it is a noisy circuit and will cause noise and I would say it is harmful to the operation of an amplifier; I don't know what a grade cylinder circuit is in one of these circuits; I don't profess to be a technical man at all, I am a practical electrician; I know that when the transformer is burned out there is no remedy for it except a new transformer; I am speaking of a 42 type amplifier; a noisy annoying hum in the reproduced sound indicates trouble, and the manner of tracing it down depends on the hum; if a loud hum I would first look at the ground circuit to see if I had the proper ground; I don't know just what else I [592] would investigate; I would have to be there with the equipment; it is merely a process of elimination that all practical electricians use to locate trouble; I don't know and couldn't say whether there is more than one possible cause of hum; in case of hum in both machines it is almost certain the trouble would be in the 42-A amplifier and you would go through that to seek it out; I don't know what I would do, I never had that trouble, I would try to locate it, if the hum wasn't bad enough to close down the show but sufficiently bad to need locating right away; when I left Juneau on February 21, 1930, to take my new position in defend-

(Testimony of Ned Lemieux.)

ant's Wrangell theatre the equipment in his Juneau Theatre at that time was running in pretty good condition; it was in fine shape; that is the last time I had anything to do with that equipment except when I came back and put in a new screen, as I testified. [593]

W. L. DALNER.

W. L. Dalner, defendant's witness, being first duly sworn testified:

Direct Examination.

I now live in Haines, Alaska, my business is electrician or theatre manager in which business I have engaged for six years, having been connected with the motion picture business for that period; before that I was an electrician, diesel engineer; I first became connected with the motion picture business with the Masterphone Sound Corporation in Seattle and continued with them for one and a half years; my duties at first were varied, but later those of installation engineer and service man; I know defendant and accepted employment with him in August, 1930, as theatre manager of his Sitka Theatre and as service man, being on call at all times, trouble arising at any house I was to be called and sent there immediately, including all of defendant's theatres. I never had occasion to go to Juneau or Ketchikan; I am still in defendant's employ; I was in Ketchikan when the equipment there was replev-

(Testimony of W. L. Dalner.)

ined in this action; I arrived in Ketchikan two or three weeks before then.

Whereupon the following proceedings took place:

Q. What, if any, information did you obtain from the Marshal as to the time he would take the equipment out?

Mr. ROBERTSON: Object, it is not the best evidence. The writ of replevin is the best evidence.

Mr. HELLENTHAL: The purpose is to show this man went to Ketchikan, and went to the Marshal and asked if he could let him know in advance when he would have to take the equipment out so he could hasten the situation, to get the other equipment in. The Marshal notified him before, and he immediately went to work changing the equipment. It has nothing to do with the Marshal's return or what the Marshal did, but merely explains what he did is all.

The COURT: He may answer.

Mr. ROBERTSON: Exception, Your Honor. [594]

Q. State what you did in the way of consulting the Marshal about the time the equipment was to be taken out?

A. We asked him to let us know in advance, if possible, when he was to take the equipment out; so one evening he dropped in to the show, I believe he was going to the show, and said he

(Testimony of W. L. Dalner.)

would be around for the equipment in the morning.

Whereupon Witness Dalner further testified: Prior to that time I had received new equipment to take the place of the replevined equipment and on advice of the marshal immediately after the show was out that night I disconnected the plaintiff's equipment which was in good condition, set it out on the foyer floor intact, and installed our new equipment; plaintiff's equipment was then in such condition that I could not reinstall it in time to run the show that night but if given time I could have done so; Witness Lawrence came in the following morning on the Alaska around ten o'clock; he came back a little later and started to dismantle their bases, getting them ready for shipment outside, I presume; after that was done he went and dismantled the amplifier rack, took it out and also the horns and speaker units backstage; he came in an hour or two after the marshal served the writ; after Lawrence dismantled the plaintiff's equipment I could not put it together again, but if I had had a blueprint I might have been able to do so, but I had no blueprint and I then installed the new equipment and started the show.

Cross Examination.

Thereupon Witness Dalner further testified: The new equipment for defendant's Ketchikan Theatre arrived, I should say, roughly two weeks prior to

(Testimony of W. L. Dalner.)

its being set up in operating condition. It was Wonderphone Equipment manufactured by the Universal High Power Telephone Company; I believe the Marshal was there ahead of Lawrence; I was installation engineer of the Masterphone, which was the same kind of equipment that defendant had in his other five theatres and very similar to the equipment that he installed [595] in the Ketchikan Theatre; I have been managing defendant's Haines Theatre since April, 1932; I was never called to either defendant's Juneau or Ketchikan Theatres in the capacity of service man.

Redirect Examination.

Whereupon Witness Dalner further testified: Defendant's five other theatres would be considered small.

Recross Examination.

Whereupon Witness Dalner further testified: Defendant's Haines Theatre is not the smallest in actual seats. [596]

J. F. MULLEN

J. F. Mullen, defendant's witness, being first duly sworn, testified:

Direct Examination.

I live in Juneau; my present position is United States Commissioner; I know and did know defendant and his Juneau Coliseum Theatre during

(Testimony of J. F. Mullen.)

1929, 1930, 1931, 1932, and 1933; I recall when the equipment was replevined from his theatre; I frequented it prior to that time probably a little better than twice a week and observed and noticed the character of the sound.

Whereupon the following proceedings were had:

Q. I mean, Mr. Mullen, did you observe the character of the sound in the theatre and equipment prior to the time the plaintiff's equipment was taken out?

Mr. ROBERTSON: Object, as it is incompetent, irrelevant, and immaterial, and no proper foundation laid.

The COURT: Overruled.

A. I did.

Mr. ROBERTSON: Exception.

Q. What was it, good or bad?

Mr. ROBERTSON: Same objection.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

A. It was bad.

Q. I mean before the equipment was taken out under the writ of replevin, was it good or bad then?

A. Comparatively speaking I thought it was good.

Mr. ROBERTSON: Same objection.

The COURT: Overruled.

Mr. ROBERTSON: Exception.

Q. How was it bad?

A. It was bad—inferior to the former equipment. [597]

(Testimony of J. F. Mullen.)

Thereupon Witness Mullen further testified: I frequented the theatre after that equipment was taken out and the new equipment installed probably the same average number of times.

Cross Examination.

Thereupon Witness Mullen further testified: I never saw the same picture by the same actors or artists in the Coliseum Theatre before the equipment was removed and after it was removed.

WHEREUPON DEFENDANT RESTED
ITS CASE.

Whereupon the following proceedings were had:

Mr. ROBERTSON: At this time, if the Court please, we first move that the exhibits "H-1" to "H-7", inclusive, including the exhibits "I" and "K", the respective series of "I" and "K" be stricken from the records, in this suit, upon the ground that the books,—that exhibits "I" and "K" are made up from the books "H-1" to "H-7" rather—and that the books "H-1" to "H-7" do not appear to be all the records of the defendant pertaining to the operation of his two theatres and they have not been properly identified as such by the witness Tuckett.

We also move at this time, if the Court please, that the jury be instructed to entirely disregard those allegations of the first and third counter-claims in respect to damages for loss of good will and profit, because there is no proof in this case of the loss of any good will and that such profits, concerning which evidence has been adduced, are so uncertain and highly speculative that they could not possibly form a measure of recovery of damages in this suit.

And we also move at this time that the jury be instructed to entirely disregard those of the affirmative defenses, as well as the second and fourth counter-claims that plead an alleged duress, upon the ground that there has been no evidence offered in this case to support the contention that the exhibits "2" and "4" were entered into, or afterwards in anywise carried out by the defendant Gross under any duress exercised upon him by plaintiff or any of its agents.

Mr. HELLENTHAL: We have refrained from offering evidence on the good will, and when the proper time comes I will withdraw that from the complaint. I think counsel is right about that.

The COURT: I think he is too. The record is absolutely barren of any testimony supporting any damage on account of loss of good will. The motion in that respect will be allowed. The other specifications of the motion I do not think are well taken at this time.

Mr. ROBERTSON: Exception, Your Honor.

REBUTTAL

LAWRENCE KUBLEY,

plaintiff's witness, being first duly sworn, testified: I reside in and have lived in Ketchikan, Alaska since 1910; my occupation is merchant and I have been engaged in the moving picture business since 1913; I ran the Dream Theatre since 1913, as well as my confectionery store, the Dream Theatre now being called the Revilla Theatre; I have also been engaged as a merchant in business in Ketchikan since 1910 and at the present time have the Ketchikan Confectionery, cigars and beer. I have an interest in the Revilla Theatre in Ketchikan under the same arrangement that defendant has with Shearer in the profits there.

I was also engaged in the moving picture business in Juneau, namely the Capitol, its name before I took it over being the Palace; when I took it over I completely remodeled it from top to bottom, threw out all the seats, redecorated it, changed all the machines, and absolutely overhauled it; its opening date was on January 15, 1931; prior to taking over the Capitol Theatre I had made an investigation or study of the motion picture conditions in Juneau; I came here in November trying to get my film circuit lined up and found there was a chance to get in on the lease of the Palace Theatre and assumed management directly afterwards; I spent about a month or a month and a half remodeling it; up to that time the Palace Theatre was no competitor at all of defendant's Coliseum Theatre, having

(Testimony of Lawrence Kubley.)

hardly no business, the leading Juneau theatre at that time being defendant's Coliseum, but the Capitol became the leading theatre in Juneau after January 15, [599] 1931, which statement I base upon the way people turned out to the theatre, the crowds we had and the compliments on the sound and equipment; up to January 1, 1931, defendant was charging 75¢ for moving picture shows in Juneau, but he dropped his price to 50¢ on January 1, 1931; I remained in Juneau from November, 1930, until March, 1931, being right in Juneau all that period; I know defendant's Witness Tuckett, having known him ever since he has been in Alaska and I knew him prior to the time I took over the Capitol Theatre; I personally saw him here in Juneau in 1931 and personally know he was here at that time.

After I opened the Capitol Theatre and had renovated it I was told that it had the best sound in Alaska; I think the furnishings and equipments of the Capitol Theatre at that time were far superior all around to the furnishings and equipments of defendant's Juneau theatre; I was personally familiar with the equipments and furnishings in defendant's theatre; we made a special effort in regard to the acoustics in the Capitol Theatre, stripped the entire ceiling of the tin with which it was covered and took out the tin covers on the radiators, hung heavy velour drapes in the balcony and on the side walls and put matronite on the entire back

(Testimony of Lawrence Kubley.)

wall, in order to effect a good sound condition; I made a personal investigation to ascertain the patronage the Palace Theatre was enjoying prior to the time I took it over and converted it into the Capitol Theatre and it had a very small patronage; I personally operated the Dream Theatre in Ketchikan, now known as the Revilla Theatre, it being my own theatre when I was operating it; I have been in Juneau frequently since 1913 and after we took over the Capitol Theatre I was here every two months or so back and forth and before that once a year; prior to my taking over the Palace Theatre and converting it to the Capitol Theatre, [600] it was no competitor for defendant's Juneau Coliseum Theatre at all but after I renovated it it was a pretty serious competitor.

Defendant himself told me on one occasion that the Capitol Theatre was a very serious competitor of his Juneau Theatre; I believe that was in June, 1932, directly after I opened the Revilla Theatre in Ketchikan, the conversation taking place on the boat just before we arrived in Seattle; he let me know we hurt him pretty badly; he said I was the cause of his losing about \$52,000.00; he said I had caused him that loss by taking over the Palace Theatre, remodeling it and putting it in good shape; it was without doubt hurting his business and patronage; Western Electric or plaintiff's equipment was installed in the Capitol Theatre when I opened it January 15, 1931, which was substantially the

(Testimony of Lawrence Kubley.)

same kind of equipment then in defendant's Juneau and Ketchikan Theatres, except we had a little later type; our equipment contained such additional improvements as might have been made in the intervening period.

I was a competitor of defendant in the motion picture business in Ketchikan for a good many years and I became a competitor of his with sound in April, 1932, in the Revilla Theatre, which was the same theatre mentioned in this case as now being operated by Shearer; Western Electric or plaintiff's equipment was installed in the Revilla in February, 1931, the same model and type as in the Capitol, but we did not actually commence operation in the Revilla Theatre until April, 1932, because business didn't warrant it at that particular time; the depression was on so heavy we figured it would be over, but it continued to get worse; the depression was worse in 1931 and we didn't open. [601]

I am familiar with actual business conditions in respect to whether they were good or bad in Ketchikan in 1931, 1932, and 1933; they were very bad in 1931; Ketchikan certainly felt the depression; the principal business or industry upon which it depends as a source of revenue is fishing and the fishing industry in 1931 and 1932 was very bad, commencing to look quite a bit better in the spring of 1932 and the first substantial improvement was in the fall of 1932; during that time there were sev-

(Testimony of Lawrence Kubley.)

eral business failures in Ketchikan, Earl Major and Adams closed out, California Grocery, Knox Jewelers, my theatre was closed for a period after sound came in, of about one and a half years; at that time there were three theatres in Ketchikan, mine, defendant's and the Liberty; the latter was closed by the creditors; the Ingersoll Hotel, Ketchikan's leading hotel, was turned loose by Mr. Ferris; the Blue Fox Cafe, Ketchikan's very best cafe, went under; I attended the theatre in Ketchikan quite frequently, going over to the defendant's Coliseum Theatre quite regularly.

Before I started up the Revilla Theatre in Ketchikan in 1932 I completely remodeled it, redecorated, all new seats, new screen, new heat and ventilating systems, entirely renovated; it was the old Dream; after being renovated it became a competitor of defendant's Ketchikan Theatre and we enjoyed a good business; I know it had some bearing on the defendant's Ketchikan theatre which I ascertained by the crowds we had at our theatre and their comments on the house and the steady attendance; prior to opening the Revilla Theatre I investigated the effect the depression had upon defendant's Ketchikan theatre and I imagine it had effect upon the attendance there, which statement I base on account of business conditions, and money was absolutely impossible to get hold of; there was no relief work at all in the winter of 1931; we had 600 [602] on city relief rolls and they came around

(Testimony of Lawrence Kubley.)

to all the merchants and secured enough to take care of the relief rolls until the C. C. C. work came in the next winter; the depression hurt everybody; I visited defendant's Coliseum Theatre during that time quite frequently, once a week, and the falling off in attendance was quite noticeable.

The price was fifty cents when I commenced operating the Revilla Theatre in April, 1932, and defendant was charging fifty cents; he afterwards made a reduction but I don't know just when it was; he dropped to forty cents and paid the tax himself; we had to meet him; I would say that he reduced his price to forty cents about a month or six weeks after the theatre tax went into effect June 21, 1932; his fifty cent price for general admission was in effect when I opened the Revilla Theatre in 1932; his price at his Ketchikan theatre had dropped to fifty cents from seventy-five cents immediately after the first of the year, the same as in Juneau, or soon after that; the Revilla Theatre in Ketchikan enjoyed a very nice business after it started up; and the Capitol Theatre in Juneau did a very good business, by which I mean a gross business on an average of around \$5,000.00 a month; there was no other theatre in Juneau except defendant's Coliseum Theatre; I know, prior to the opening of the Capitol, the Palace Theatre was doing very little business. I had a contract relative to plaintiff's servicing my talkie equipment in my two theatres, and they serviced them; commencing

(Testimony of Lawrence Kubley.)

in Juneau around the first of 1931 when we installed sound; I believe I heard Cawthorne testify in this suit; "service" by those in the moving picture business, is meant to inspect and keep talkie equipment in running shape—inspection and service for the purpose of keeping it in first class running order; I did not understand it to mean that there would be no breakdown or stoppage at any time; a breakdown might come at any time; I understood in this respect that the engineer would look at it once a month and inspect and go over it thoroughly and give it the service it needed. [603]

Cross Examination.

Thereupon Witness Kubley further testified: I don't recall when the depression commenced in Ketchikan; we had quite a session and it was at its height and worst in 1931; I wouldn't say that it really commenced or that times had been dull some years before that; it was dull in the fall when the halibut fleet was out, that fleet belonging in Seattle; possibly the closed season of halibut started somewhere around 1924, 1925, or 1926; Ketchikan did not become quiet in a business way that far back; it slowed up some for a few months in the winter time when the halibut boats weren't there; I can't say whether or not the winter closing of halibut resulted in people quitting eating halibut and eating other fish, and I don't know that when the season was opened after the closed season the

(Testimony of Lawrence Kubley.)

market was flooded with halibut with no sale for fresh fish; I never heard of that; they always sold plenty of halibut; when the season opened the price went up and was very high; whenever the halibut season opens up the first ships are naturally high; after they unload the fish, they had a steady market; I am not in the fish game and have no idea as to how steady the market holds, it fluctuates up and down; but I do know that in the spring around Easter time it is still high so they must enjoy a fairly good price.

The depression of the Nation certainly was general along during 1930 and 1931; it was at its height then; I know it was not so noticeable in the fall of 1929 as it was later on when the different business houses were closed, along about 1931 when most of them felt it worst; some might have closed in 1930; I wouldn't say the particular date or time of year when the business houses were closing; plenty of them closed; I don't recall any closing in 1933 but I think one or two did in 1932; it was along about 1931 when the worst hit; I know the depression for one or two years made them lose their business; I didn't have my theatre in Ketchikan ready January 1, 1931, but sound was put in in February, 1931, and I delayed [604] opening it because of the depression, and opened it in 1932 at which time things began to look better; defendant has a nice theatre in Ketchikan, it is the largest theatre there.

(Testimony of Lawrence Kubley.)

Prior to my opening my theatre in Juneau, January 5, 1931, the Palace Theatre had been operated in that same theatre building and had had sound equipment in it, having been operated for a number of years, probably ten or fifteen years; I was familiar with defendant's Juneau Theatre to the extent that I was a patron there occasionally and he had a pretty nice theatre here, good sized house, holds five or six hundred people, and equipped as good as the equipment could be at the time; it was built several years ago, many years prior to my arrival here; the seats were regular theatre chairs, practically new when I came here and the walls were artistically decorated to a certain extent; I remodeled the Capitol, redecorated it, put in new seats, and fixed it up generally; defendant should have been doing a good business; after I opened I ran Metro Goldwyn, R. K O., Columbia, United Artists and Universal services, while Gross ran Warner Bros., First Nat'l., Fox, some Pathe, and Paramount; Metro Goldwyn were not the only first-class picture besides Metro-Goldwyn; there were then ten major companies, he had five and I had five; I did a good business after I got started and I think Gross' business dropped off; after we opened in Ketchikan I did a good business there and I imagine we hurt Gross' business some; I did not fail in the theatre business in Juneau and Ketchikan or close my house in Juneau; I am still operating, and I did not fail to meet my obligations;

(Testimony of Lawrence Kubley.)

I did not sign an agreement with Shearer in which I confessed I owed over \$30,000.00; defendant and I have always been competitors the last thirteen years but I wouldn't say I don't like him. [605]

Redirect Examination

Thereupon Witness Kubley further testified: Gross' Juneau Theatre at the time I opened the Capitol had a tin ceiling, which had a very bad effect on sound; I did not delay the opening of the Revilla Theatre on account of being delayed in the obtaining of picture service. [606]

ERIC PAULSON,

plaintiff's witness, being first duly sworn, testified: I live in Juneau; my occupation is theatre manager; I now manage the Uptown Theatre; I started in the moving picture business in 1907 and since then have been engaged in it approximately 19 years out of the elapsed 27 years; I was connected with the moving picture business in Seattle three or four years before sound came in; with the Liberty in Ketchikan as operator from 1919 to 1922, and as operator of the Dream Theatre of which Lawrence Kubley was owner, in Ketchikan from 1922 to 1929; I was manager of the Capitol Theatre in Juneau from January 15, 1931, until May 4, 1933; its name prior to that was the Palace; before opening the Capitol Theatre I personally investigated the theatre

(Testimony of Eric Paulson.)

business in Juneau, coming up here from Ketchikan in June, 1930, at which time the Coliseum and Palace Theatres were running in Juneau; I made my investigation by attending the shows and found that the Palace had a very small patronage at that time in comparison with the patronage at the Coliseum, the latter then being by far the better theatre, the Palace Theatre being in a rather run-down condition; I made a further investigation during the last days of November, 1930, over a period of five or ten days, by attending the Palace Theatre and found that very few people were attending it; Kubley and I renovated the Palace Theatre in December, 1930, converting it into the Capitol Theatre, tearing down the tin ceiling, changing the entrance to the balcony, placing the entrance on the inside of the foyer, rearranging the foyer and loges, painting the walls with Glosstex, putting in new [607] drapes, new carpets, new loge seats and new title curtain and also a new Western Electric equipment, with new heads in them; those renovations improved the sound and looks of the theatre, which opened as the Capitol on January 15, 1931, with the picture, "Let Us Be Gay".

Defendant's Coliseum Theatre in Juneau was superior to the Palace Theatre but I would say that the Capitol Theatre was the best as between it and defendant's Coliseum Theatre; the Capitol Theatre did a very good business after it opened up, having an approximate attendance of 650 people on its

(Testimony of Eric Paulson.)

opening night, which business continued for the two years I was there, having an average attendance of between 280 and 290 people a day with very good average gross receipts of between four and five thousand dollars per month for the period up to January 1, 1932, gross receipts running during the eleven and a half months that it ran in 1931 of something over \$49,000.00, close to \$50,000.00.

Prior to the time the Capitol opened defendant was charging seventy-five cents for general admissions to his Juneau Theatre, which he reduced on January 1, 1931, to fifty cents, which was the price charged by the Capitol Theatre upon its opening, commencing on January 15, 1931; defendant put that reduced price into effect first; I know Witness Tuckett, having known him practically since he came to Alaska about 1923 or 1924; he was in Juneau the first part of January, 1931, and I talked to him here about the price of admissions to the theatres: subsequently to the fifty cent price being put into effect, defendant reduced the general admission price to his new picture show in Juneau to forty cents due to the sales tax that became effective about June 21, 1932; I believe that he reduced it to forty cents right after the tax went into effect; we didn't make any price reduction in the Capitol Theatre for quite a little later on but increased our price to fifty-five cents [608] keeping that in effect until October or November, 1932, when we reduced it to forty cents because general busi-

(Testimony of Eric Paulson.)

ness was rather low here and people didn't like to pay the fifteen cents extra we charged, as for a period of some months we charged fifteen cents more than defendant's Juneau Coliseum Theatre.

The gross receipts of the Capitol Theatre during 1932 were close to \$49,000.00, not quite so large as in 1931; I don't include the tax in gross receipts, the attendance in the Capitol Theatre during 1932 was practically the same as during 1931. I made an investigation of the business that defendant's Coliseum Theatre was doing by going down there occasionally looking at the show and checking the people coming into the house; I think the operation of the Capitol Theatre had a bad effect on the attendance at defendant's Coliseum Theatre; in February, 1931, I went to Ketchikan to help plaintiff's engineer install sound equipment in the Revilla Theatre, during which time Witness Kubley remained in Juneau; I think I was in Ketchikan between two and three weeks.

The Ketchikan's Dream Theatre's name was changed in April, 1932, to Revilla, at which time it opened having been renovated and refurnished, the balcony having been practically torn out, rebuilt, new operating room, recarpeted, refitted, repaired, drapes hung on the walls and equipment installed, the latter having been installed in February, 1931; prior to the renovation of the Revilla Theatre, defendant's Ketchikan Coliseum Theatre was better than the Dream Theatre, there being no comparison;

(Testimony of Eric Paulson.)

after the Revilla Theatre was renovated and fixed up, in my estimation the Revilla Theatre was the best, but the Coliseum Theatre was the largest; there was also a third theatre in Ketchikan, the Liberty, but there was no comparison between it and either the Coliseum or the Revilla; after [609] the Revilla Theatre was renovated in April, 1932, it was the superior theatre in Ketchikan as to equipment, furnishings, and things of that kind; I am familiar with the Liberty Theatre in Ketchikan, having worked in it; I wouldn't say that it was very bad competition for defendant's Coliseum Theatre because it was a small house and its furnishings and equipment didn't compare with the Coliseum, nor was it hardly any competitor of the Revilla after the latter opened in April, 1932; I understood that some time during this period, prior to April, 1932, the First National Bank of Ketchikan took over all the bills, and whole works of the Liberty Theatre and turned them over to another manager.

The business done by the Capitol Theatre in Juneau from January 1, 1933, to May 1, 1933, was not so good, there being a falling off of perhaps fifty per cent, due to the weather, as we had lots of snow, winds, rain and cold, which I found affected the attendance at the theatres in Juneau; weather conditions did not affect the attendance in the Ketchikan Theatre so much as in Juneau; I have found that summer time is the poorest season of the year for attendance at Juneau, but in Ketchikan probably

(Testimony of Eric Paulson.)

the two or three months while the halibut boats are out were the poorest season; I was present when Witness Cawthorn was testifying and heard his testimony; plaintiff serviced the talkie equipment in the Capitol Theatre in connection with its operations; my understanding is that the word "service" among people engaged in the motion picture business relative to the servicing of talkie equipments, means checking, inspecting and repairing when needed, once a month or so, in order to keep the machines in good running order.

Whereupon the following proceedings were had:

Q. Please state what, if any, meaning is given to the term "Service" by the theatre industry and those engaged in it, in respect to meaning that talkie equipment must be kept in perfect condition at all times by those servicing it.

A. The way I understand is that "service" means to keep the set in good shape so that she will run.

Q. How do you mean, "so that she will run"?

A. Well, so that she is ready for operation.

[610]

Cross Examination

Thereupon Witness Paulson further testified: I am now operating in Juneau the Uptown Theatre, which is a fine theatre elegantly equipped and I believe the best equipped in Juneau, having operated it for four months during which time it has been open to the public. [611]

JAMES C. COOPER

James C. Cooper, plaintiff's witness, being first duly sworn, testified: I am a certified public accountant holding a certificate from the State of New York and have engaged in the profession of accountancy approximately twenty-two years in New York City, Los Angeles, Chicago, Kansas City, Seattle, and Juneau; I have just finished an audit of the books of the Territorial Treasurer and the Territorial Auditor; I have no connection whatever with plaintiff but was employed by it after this case started in order to check some of these exhibits, books and things which have been put in evidence or produced here by defendant; prior to that time I had no connection with plaintiff; I did not come to Juneau for the purpose of being a witness in this suit; I have made some analyses of defendant's exhibits Series I and K and have checked over those exhibits so far as it is possible with the records that were submitted to us; I have attempted to verify the additions in those exhibits and have found some discrepancies or mistakes; on exhibit K-3 under August, 1931, the column headed "Film Freight" shows a total of \$7.75, whereas that column total should be \$21.49, or a difference of \$13.74, an understatement in the costs of that amount; on exhibit K-1, May, 1929, "Film Rental" shows a total of \$973.96, whereas the correct total is \$1,373.96, or an under-statement of expense of \$400.00, which would increase the cost by that amount; in the same exhibit, August, 1929, the column headed "Wages"

(Testimony of James C. Cooper.)

is \$505.13, whereas the correct total is \$465.13, or a difference of \$40.00, which would decrease the cost by \$40.00; October, 1929, "Film Rental" is added \$2,718.20, while the correct total is \$2,713.08, of a difference of \$5.00; on exhibit K-2, October, 1930, "Film Rental" the total is \$1,984.01, whereas the correct total is \$3,134.01, or a difference of \$1,150.00, which would increase the cost by that amount; February, 1929, exhibit K-1 various totals [612] show \$2,056.36, whereas the correct total is \$2,056.40, or a difference of 4¢; April, 1929, cross footing is shown as \$2,225.52, whereas the correct amount is \$2,223.52, or a difference of \$2.00 over-stated; December, 1929, cross footing is \$3,537.45, whereas correct amount is \$3,737.80, or a difference of \$235.35; January, 1930, cross footing is \$3,696.66, whereas correct amount is \$3,453.66 or a difference of \$243.00 which would be a decrease; November, 1930, cross footing is \$3,002.30, whereas correct amount is \$3,008.30, or a difference of \$6.00 increase; on exhibit I, June, 1929, column "Repairs" the total is \$371.67, whereas the correct total is \$372.67 or a difference of \$1.00 under-stated expenses; June, 1931, exhibit I "Wages" total is \$290.00, whereas the correct total is \$390.00 or an understatement in expenses of \$100.00; I have also found eight other small errors of one or two dollars each; the items of \$400.00 and \$1,150.00 that I mentioned were understatements in the cost.

Whereupon the following proceedings were had:

[613]

(Testimony of James C. Cooper.)

Mr. ROBERTSON: If the Court please, we offer in evidence all the income tax returns of the defendant Gross which are here. (Being plaintiff's exhibits 43 and 44 for identification.)

Mr. HELLENTHAL: Object to them as irrelevant, incompetent and immaterial. They have been properly submitted to counsel for the purpose of interrogating a witness on such questions as he wished. He availed himself of that purpose. The only witness who knew anything about them was then on the stand. Counsel knew he was going to leave. He has since left the territory and cannot be recalled. For the further reason that counsel objected to the income tax returns when they were offered by us when the witness was here to explain them. They were ruled out on counsel's objection. While one was admitted before the ruling was made they were withdrawn by us on the understanding that the court had ruled against them.

The COURT: As I understand this thing, the general objection of the plaintiff to the admission of these in the first place was that they concerned the matter of profits, which wasn't involved.

Mr. ROBERTSON: Yes, I contended it was not evidence on the true measure of damages.

The COURT: When we had the reverse of the issue the defendant objected to the admission on the ground that they didn't represent a true statement of the account—in other words that the income tax statements which are here being offered were

(Testimony of James C. Cooper.)

not the income tax statements that were afterwards settled and accepted by the Government as such. Then we took a lot of time having the witness state what adjustments, settlements, etc., were made as a basis on the income tax returns, so that I don't think that they would be admissible at this time. I don't think this is the time, under the state of the testimony and at this stage of the trial, that they would be admissible. We would be opening up new avenues of investigation here which could continue on and on with nothing to be gained.

Mr. ROBERTSON: The witness Tuckett testified when I asked on cross examination where the work sheets were, and he claimed the work sheets were his personal property relative to the income tax returns and he had taken them to Portland and hadn't brought them back; furthermore they put in evidence their statements. These schedules are based, in part, upon these very income tax returns. I can't see why we are not entitled to take the figures from them if they can. We are meeting them. That was their case in chief. We are trying to rebut some of their evidence in chief.

The COURT: I understand the only thing that was taken from these income tax returns was the matter of the capital investment. Is that right?

Mr. HELLENTHAL: We didn't get the capital investment from the income tax returns. We got that from the appraisal made by the income tax man and Tuckett.

(Testimony of James C. Cooper.)

The COURT: Wasn't that included in the income tax returns as finally settled with the Government. [614]

Mr. HELLENTHAL: I don't know, except that all the evidence we offered was that Mr. Tuckett and the income tax man made an actual cash appraisal of the property and that was used by Mr. Tuckett in his calculations to determine the capital investment, but that has nothing to do with income tax. Probably they used it, but he didn't so testify.

The COURT: Any other part of the income tax returns used as a basis of calculation in these other statements?

Mr. ROBERTSON: One of the first questions I asked the witness Stabler was whether or not copies of the income tax were not used in preparing these analyses, exhibits "I" and "K" and he testified they were.

The COURT: What part of them?

Mr. ROBERTSON: I didn't ask him that, but I asked him whether or not he did not use the copies of these income tax return papers in preparing those exhibits. I submit it will show in the Reporter's record on that.

Mr. HELLENTHAL: I don't recall it.

The COURT: That isn't my recollection. If the record so shows you have the privilege to refer to it.

(Testimony of James C. Cooper.)

(Recess while Reporter looked up testimony.)

(Continuing):

Mr. ROBERTSON: I would like to ask the reporter to read the evidence, where I asked the witness Stabler in that respect, Your Honor.

The COURT: Very well.

(The Reporter here read the testimony of Harold Stabler—from page 729 of reporter's transcript—as follows):

“Q. You recognize those exhibits by number, don't you, exhibit “I” and “K”?”

A. Yes.

Q. What if any books, records or documents did you use in preparing them, other than those exhibits H-1 to 7?

A. There is nothing else.

Q. Didn't you use copies of Mr. Gross' income tax returns?

A. They were the basis for some figures.

Q. You did use them too, didn't you?

A. Yes, for some of the figures.

Q. From those exhibits ‘I’ and ‘K’ you excluded numerous items when you were preparing them, numerous items show in exhibits H-1 to 7?

A. Yes sir, we excluded certain items from those books.

Q. Who told you to exclude them?

A. Mr. Tuckett.

Q. Anybody else tell you?

A. No sir.

(Testimony of James C. Cooper.)

Q. Mr. Gross tell you?

A. No sir.

Q. Mr. Hellenthal?

A. No sir.

Q. Or Mr. Faulkner?

A. No sir. [615]

Q. Just Mr. Tuckett?

A. Yes sir.

Q. Now then you had no personal knowledge, as I understand it, whether or not they should be excluded, is that correct?

A. No sir.

Q. What do you mean by 'no sir'?

A. Sir?

Q. Do you mean you did have personal knowledge or didn't have personal knowledge—I ask you again.

A. I had no personal knowledge of the books at all."

Mr. ROBERTSON: I submit, if the court please, that substantiates he did use the income tax figures for that purpose and that so far as anything about Mr. Tuckett going away, we are prepared to show these analyses aren't made in a matter of a few hours or a few minutes, that the witness has gone into them very very carefully and taken a lot of time to get them and we worked night and day going through them and it was not any duty of ours to retain the witness Tuckett here.

(Testimony of James C. Cooper.)

The COURT: Are you prepared to show what part of the income tax returns—that is what we are talking about now—the defendant's income tax returns——

Mr. ROBERTSON: We are prepared to show what part we used.

The COURT: ——were used in the preparation of the compilations already in evidence.

Mr. ROBERTSON: No, we don't know what parts they used. It wasn't up to us to bring that out and show them. We didn't ask them what part they used. We are prepared to show what part we used. They certainly used them in trying to calculate the rent, and so on.

The COURT: In calculating the rent?

Mr. ROBERTSON: Yes, that depreciation which they claimed was the same, as I understood it.

Mr. HELLENTHAL: No rent calculation in these papers.

Mr. ROBERTSON: They took six per cent of the capital investment as depreciation and stated that that was the same as rent.

The COURT: I understood the capital investment they testified was made up of the appraisal made by the income tax man and Tuckett jointly and doesn't have anything to do with the income tax returns of the defendant here and was developed from the statement that was afterwards made up as a basis from the income tax statement that was subsequently made up and adjusted and settled,

(Testimony of James C. Cooper.)

or rather accepted by the Government as a basis for their income tax for those years, but I didn't understand it has any reference at all to the income tax return that was made by the defendant.

Mr. ROBERTSON: Certainly it does, if the court please. It is an allowance on the income tax return. If you have any capital investment you take off depreciation and that in turn naturally diminishes your income tax that much. It is an [616] essential part of the income tax return if you have any capital investment. You take depreciation from year to year and if you take too much the income tax people are very prompt in calling attention to it.

The COURT: That is what I am talking about. It was not figures incorporated in the income tax return but figures made up subsequently to that which are in evidence, made up by the internal revenue agent and the defendant, or his representative, jointly.

Mr. ROBERTSON: That is a matter to include in your return, Your Honor.

The COURT: It undoubtedly was included in the return finally used by the Government, but it isn't included in the original return which we are talking about now.

Mr. ROBERTSON: On the contrary, Your Honor, some of these returns certainly have depreciation or something of that kind stated right in them. I refer to plaintiff's exhibit "44" for identification, right on the first page. (Handing to court.)

(Testimony of James C. Cooper.)

The COURT: Well, this income tax return covers all of the income of the defendant from all sources?

Mr. ROBERTSON: Certainly.

The COURT: I don't see any part of it in here segregated in any intelligible way. I think it would be more misleading than it would be helpful to the jury. The offer will be refused.

Mr. ROBERTSON: Very well. At this time we offer to have marked for identification—that is, to the offer to receive the income tax returns in evidence.

The COURT: Denied.

Mr. ROBERTSON: Exception. That includes plaintiff's exhibit "43" for identification, plaintiff's "44" for identification; and we ask at this time counsel produce the ones for the other years if they have them here with them. [617]

PLAINTIFF'S EXHIBIT 43

for identification is as follows: printed "Form 1040—Treasury Department—Internal Revenue Service" and is headed: "Individual Income Tax Return—For net incomes from salaries or wages of more than \$5,000 and incomes from business, profession, rents, or sale of property for calendar year 1929, W. D. Gross, Juneau, Alaska; Occupation: Motion Picture.

"See Statement Attached Hereto"

(Testimony of James C. Cooper.)

INCOME

	At Juneau	At Ketchikan
RECEIPTS		
Total Theatre Receipts for year	\$52,478.55	\$58,222.74
Total Rent from Apts. & Stores	6,852.85	630.00
	<hr/>	<hr/>
Total Gross Income	\$59,331.40	\$58,582.74
Total Rent from Seattle, Property	\$ 8500.00	
Grand total of all income	\$126,414.14	
(forwarded)		
[618]		
DEDUCTIONS		
EXPENSE :		
Wages, paid	\$12,382.56	\$ 8,152.00
Films, cost	11,912.27	33,981.76
Freight, paid	1,052.62	482.40
Lights, Elec. Etc.	3,716.02	1,425.19
Fuel & Fuel Oil	1,100.27	376.68
Advertising Newspapers Etc.	1,053.85	1,113.69
Repairs & Replacements	1,742.83	5,096.10
Premiums on Fire Ins. & Insurance	1,759.81	712.50
Taxes, Municipal, Terr. & Federal	7,729.30	742.05
Interest on Borrowed Money	3,215.80	
Traveling Expenses	2,071.93	25.00
Gen'l Expense, all others	3,723.89	25.00
Loss, Bad Accounts	980.56	
Charity	104.00	15.00
	<hr/>	<hr/>
Total Expense	\$52,545.71	\$52,120.37
Net Operating Profit at Juneau	6,785.69	
Net Operating Profit at Ketchikan		6,462.37
Net Income from Seattle, Property	\$ 8,500.00	
Total Net Operating Profit at Juneau, Ketchikan and Seattle	\$21,748.06	

(Testimony of James C. Cooper.)

DEPRECIATION AT JUNEAU

	Acquired	Cost	Depreciation Charged Off		
			Previous Years		This Year
Gross Apts.	1929	\$15,000.00		5%	\$ 750.00
Wooden Bldg.	1921	40,000.00	\$12,000.00	5%	\$ 2,000.00
Furn. & Fix.	1926	30,000.00	9,000.00	10%	3,000.00
Machinery	1921	5,000.00	3,000.00	10%	500.00
Totals		\$90,000.00	\$24,000.00		\$ 6,250.00
At Seattle					
Building & Lot	1928	\$125,000.00	—	2½%	\$3,125.00
At Ketchikan					
Wooden Bldg.	1922	\$60,000.00	\$15,000.00	5%	\$ 3,000.00
Furn. & Fix.	1922	30,000.00	15,000.00	10%	3,000.00
Machinery	1922	5,000.00	2,500.00	10%	500.00
Total		\$95,000.00	\$32,500.00		\$ 6,500.00

RECAPITULATION:

Net profit at Juneau	\$ 6,785.69
Net profit at Ketchikan	6,462.37
Net rents Seattle, property	8,500.00
Total	\$21,748.06

Depreciation

At Juneau	\$ 6,250.00	
At Ketchikan	6,500.00	
At Seattle	3,125.00	15,875.00
Total	\$15,875.00	

Net profit over and above expenses and repairs and depreciations: \$ 5,873.06

There are no other receipts, income, expenses, repairs and depreciation other than shown hereinabove.

(Testimony of James C. Cooper.)

"EARNED INCOME CREDIT	
"21. Earned Income (not over \$30,000)	\$ 5,873.06
"22. Less Personal Exemption and Credit for Dependents	3,900.00
	<hr/>
"23. Balance (Item 21 minus 22)	\$ 1,973.06
"27. Normal Tax (1½% of Item 24)	\$ 9.87"

Attached to the foregoing copy of Defendant's Income Tax Return and produced by him with it and a part of said exhibit are the following papers, viz:

Letter from Internal Revenue Service to Gross, dated Feb. 3, 1932, re: Procedure for taking appeal;

Printed form of letter from David Burnet, Commissioner of Internal Revenue, to Gross, dated Feb. 3, 1932, advising that the determination of defendant's tax liability for 1929 disclosed a deficiency of \$855.61 "as shown in the attached statement";

Typewritten statement headed "In re: Mr. W. D. Gross, Juneau, Alaska. Tax Liability. Year 1929. Tax Liability \$855.48. Tax assessed \$9.87. Deficiency \$855.61."

Printed Form 870, Treasury Department, (in duplicate) headed: "In re Mr. W. D. Gross, Juneau, Alaska. Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," which is unsigned.

(Testimony of James C. Cooper.)

Printed Notice re Appeals should be addressed to
United States Board of Tax Appeals.

Printed Notice, Form 882, Treasury Department,
re payment.

Copy of unsigned letter dated September 3, 1932,
from Defendant to Collector of Internal Revenue,
Tacoma, Wash., reading:

September 3, 1932

Collector of Internal Revenue,
Tacoma, Wash.

Dear Sir:

Mr. Fear, your agent was in my office and ask
for payment of tax due in 1929.

We admit this tax of 1929 and for which we are
sorry that payment has been delayed because of
poor business and investments in the small towns of
S E Alaska.

We owe considerable money on conditional sales
contracts and the people that hold these contracts
are threaten to replevin the material if the con-
tracts were not taken care of. This forced us to take
care of this indebtedness so that we could keep our
doors open.

We also had contract obligation for films that
was running from 40% to 50% of our proceeds,
which we could not get out of at the time being, but
at present we have succeeded in reducing this film
rental this year. [620]

So therefore we are giving Mr. Fear a check for
\$100.00 for this month and we will try to pay this

(Testimony of James C. Cooper.)

amount each month on this past due taxes. I will also try to enlarge these payments as soon as I am able to pay off what indebtedness is now outstanding and the conditional sales contract payments have been taken care of for which they are now forcing me to keep up.

Hoping that this meets with your approval and thanking you for your past co-operation I remain,

Very truly yours,

WDG/c

Printed Notice, reading: "Notice. This is a copy of the report of the examiner of your income tax return. It is an important document and should be carefully preserved", to which is attached a printed form of letter, Form 850, dated Seattle, Wash., December 19, 1931, addressed to defendant, headed: "In re Income Tax. Date of report: Dec. 17, 1931. Recommendation: Year 1930 Additional Tax \$178.44. Total \$178.44", signed by "Geo. C. Earley, Internal Revenue Agent in Charge", to which letter are attached five typewritten sheets containing detailed statements of adjustments in defendant's income tax return, followed by a printed form, reading: "Name W. D. Gross. Statement of Total Tax Liability. Year 1929: Tax previously assessed \$9.87. Adjustments proposed in accompanying report, Deficiency \$855.61. Correct Tax Liability \$865.48", followed by a letter dated Dec. 26, 1931, from defendant reading:

(Testimony of James C. Cooper.)

December 26, 1931.

Mr. Geo. C. Earley
Internal Revenue Agent in Charge
Seattle, Wash.

Dear Sir:

I received your income tax report written December 19, 1931, a complaint formally made out by your special agent that was in Alaska, Mr. John H. Clauson. According to Mr. Clauson's statements, however, some of the items that were in the books are not correct.

After receiving your information, I immediately started to investigate regarding your complaint.

I found that our new bookkeeper in making out the income tax reports for the years of 1929 and 1930 have not been attend to proper expenditures on our ledgers, so therefore, we ask for an extension of this claim as I am getting a capable auditor to investigate our books and revise our taxes of 1929 and 1930.

Please send me a new tax sheet for 1929 and 1930 and will be more than much oblige to you.

Thanking you for your information, also please find signed statement.

Yours sincerely

W. D. GROSS

WDG.P

[621]

followed by a letter dated January 4, 1932, to Gross from "Geo. C. Earley, Internal Revenue Agent in

(Testimony of James C. Cooper.)

Charge," acknowledging receipt of defendant's letter of December 26, 1931; followed by a mimeographed form headed "Instructions as to the Preparation of Protests against findings of Revenue Agent's Reports."

PLAINTIFF'S EXHIBIT 44

for Identification is as follows: printed "Form 1040 Treasury Department—Internal Revenue Service" and Headed: "Individual Income Tax return for Net incomes From Salaries or Wages of More than \$5,000.00 and Incomes for Business, Profession, Rents, or Sale of Property for Calendar Year 1930 W. D. Gross, Gold Belt Avenue, Juneau, Alaska. Occupation: Theatre owner and operator."

"Item and Instruction No.		
" 2. Income from Business or Profession		\$9,768.56
"12 Total income in Lines 1 to 11		<u>\$9,768.56</u>
"20. Net Income (Item 12 minus item 19)		\$9,768.56
"Earned Income Credit		
"21. Earned Income (not over \$30,000.00)	\$5,000.00	
"22. Less personal exemption and credit for dependents	\$3,900.00	
"23. Balance (item 21 minus 22)	<u>\$1,100.00</u>	
"24. Amount taxable at 1½%	<u>\$1,100.00</u>	
"27. Normal Tax (1½% of Item 24)	<u>\$1,650.00</u>	

(Testimony of James C. Cooper.)

“31. Tax on Earned Net Income (total of items 27 to 30)	\$1,650.00
“32. Credit of 25% of Tax (not over 25% of Items 30, 44, 45 and 46)	\$ 4.12
Computation of Tax	
“33. Net Income (item 20 above)	\$9,768.56
“36. Credit for Dependents \$ 400.00	
“37. Personal exemption 3500.00	<u>3500.00</u>
“38. Total of Items 34 to 37	\$3,900.00
“39. Balance (Item 33 minus 38)	\$5,868.56
“40. Amount taxable at 1½% (not over \$4000.00)	\$4,000.00
“41. Balance (Item 39 minus 40)	\$1,868.56
“44. Normal tax (1½% of Item 40)	\$ 60.00
“45. Normal tax (3% of Item 42)	\$ 56.06
“48. Tax on Net Income (total of items 44 to 47)	\$ 115.06
“51. Less Credit of 25% of Tax on earned income (Item 32)	\$ 4.12
“52. Total of Tax (Item 50 minus 51)	\$ 111.94
“55. Balance of Tax (Item 52 minus Items 53 and 54)	\$ 111.94”

(Testimony of James C. Cooper.)

To the Printed Form 1040 is pasted the following typewritten statement, viz.:

INCOME

	At Ketchikan	At Wrangell	At Petersburg	At Douglas	At Juneau
RECEIPTS					
Total Theatre					
Receipts for year	\$52775.20	\$14790.56	\$15897.35	\$ 3338.05	\$53798.14
Total rents from					
Apt. & Stores	360.00				9390.00
Other incomes					
Slides & Etc.	800.00				
Grand total of					
All income	\$53935.20	\$14790.56	\$15897.35	\$ 3338.05	\$63188.14

At Haines	At Sitka	Alaska Film Exchange	At Seattle
\$4752.75	\$6464.26	\$60,554.50	\$8500.00
	90.00		
\$4752.75	\$6554.26	\$60,554.50	\$8500.00
Grand Total of All Income			\$170,956.31

(Testimony of James C. Cooper.)

	At Ketchikan	At Wrangell	At Petersburg	At Douglas	At Juneau
DEDUCTIONS					
Wages	\$ 7,515.50	\$ 2,732.50	\$ 5196.57	\$ 1272.40	\$13607.55
Alaska Film Exchange	35500.00	5500.00	6238.55	1373.65	12102.30
Films Cost					
Freight	203.77	74.34	300.25	80.60	1031.52
Light, Elec. Etc.	1085.05	427.03	531.43	82.30	2711.75
Fuel, Fuel Oil	456.71	177.01	221.72	58.00	1867.97
Advertising					
Newspaper Etc.	1236.40	150.40	542.35	84.05	1410.11
Repairs & Replacements	750.00		241.48	151.15	9410.50
Premiums on Fire Ins. & Ins.	437.50				1357.00
Taxes, Municipal Terr. & Federal	416.50	360.00	70.00	50.00	1501.12
Interest on Borrowed Money	375.65				3708.43
Traveling Exp.					1625.05
Gen'l Expense	200.00	218.36	322.42	35.75	1969.72
Rents Paid on Bldgs. & Equip.	4118.12		1650.00	245.00	2595.73
Loss, Bad Accounts					
Charity			42.00		127.00
Net Operating Profit at	\$ 1640.00	\$ 5150.92	\$ 450.48	\$ 94.75	\$ 8162.39
				Loss	

(Testimony of James C. Cooper.)

	At Haines	At Sitka	Alaska Film Exchange	At Seattle
Wages	\$ 1742.45	\$ 1500.00	\$ 25.00	
Alaska Film Ex.	2450.00	2800.00		
Film Cost			43094.18	
Freight	54.43	102.00	122.81	
Light, Elec. Etc.	45.00	191.71		
Fuel, Fuel Oil		131.02		
Advertising			14.60	
Newspaper Etc.				
Repairs & Replacements				
Premiums on Fire Ins. & Ins.			213.00	
Taxes, Municipal Terr. & Federal			3650.54	
Interest on Borrowed Moneys			100.00	\$ 2575.50
Traveling Exp.			182.00	
Gen'l Expense	50.84			
Rents Paid on Bldg. & Equip.			1883.91	
Loss, Bad Accts.				
Charity			123.00	
Net Operating				
Profit at	\$ 410.03	\$ 1829.53	\$ 11145.46	\$ 5924.50
Total Net Operating				
Profit in All Places				\$34,618.66

(Testimony of James C. Cooper.)

DEDUCTIONS OF DEPRECIATION

	Acquired	Cost	Depreciation Charged		This Year
			of Previous Years		
Depreciation at Juneau.					
Gross Apt.	1929	\$ 15000.00	\$ 750.00	5%	\$ 750.00
Wooden Bldg.	1921	40000.00	14000.00	5%	2000.00
Furniture & Fixtures	1926	30000.00	12000.00	10%	3000.00
Machinery	1921	5000.00	3500.00	10%	500.00
Totals		\$ 90000.00	\$30250.00		\$ 6250.00
At Ketchikan					
Wooden Bldg.	1924	\$ 60000.00	\$18000.00	5%	\$ 3000.00
Furniture & Fixtures	1924	30000.00	18000.00	10%	3000.00
Machinery	1924	5000.00	3000.00	10%	500.00
Totals		\$ 95000.00	\$39000.00		\$ 6500.00
At Seattle					
Bldg. & Lot	1928	\$125000.00	\$ 3125.00	5%	\$ 6250.00
Totals		\$125000.00	\$ 3125.00		\$ 6250.00
At Douglas					
Machinery	1930	\$ 5000.00	—	10%	\$ 500.00
					[624]
At Petersburg					
Machinery	1930	\$ 5000.00	—	10%	\$ 500.00
At Wrangel					
Wooden Bldg.	1930	\$ 20000.00	—	5%	\$ 1000.00
Furniture & Fix. Mach.	1930	9000.00	—	10%	900.00
Totals		\$ 2900.00			\$ 1900.00
At Haines					
Wooden Bldg.	1930	\$ 5000.00	—	5%	\$ 250.00
Furniture, Fix. & Mach.	1930	7000.00	—	10%	700.00
Totals		\$ 12000.00			\$ 950.00

(Testimony of James C. Cooper.)

At Sitka

Wooden Bldg. & Iron	1930	\$ 18000.00	—	5%	\$ 900.00
Furniture, Fix. & Equip.	1930	11000.00	—	10%	1100.00
Totals		<u>\$ 29000.00</u>			<u>\$ 2000.00</u>

RECAPITULATION:

Net Profit at Ketchikan	\$ 1640.00
Net Profit at Wrangel	5150.92
Net Profit at Petersburg	450.48
Net Loss at Douglas	94.75
Net Profit at Juneau	8162.39
Net Profit at Haines	410.03
Net Profit at Sitka	1829.53
Net Profit at Alaska Film Exchange	11145.46
Net Profit at Seattle	5924.50
Total	<u>\$34618.56</u>

DEPRECIATION

At Juneau	\$ 6250.00	
At Ketchikan	6500.00	
At Seattle	6250.00	
At Douglas	500.00	
At Petersburg	500.00	
At Wrangel	1900.00	
At Haines	950.00	
At Sitka	2000.00	
	<u>\$24850.00</u>	<u>\$24850.00</u>

Net Profit over and above expenses & Repairs, Depreciation Etc.	\$ 9768.56
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There are no other receipts, income, expenses, repairs and depreciation other than shown hereinabove.

(Testimony of James C. Cooper.)

Fastened to the foregoing copy of Defendant's Income Tax Return, and produced by him with it and a part of said exhibit were the following papers, viz.:

"Notice: This is a copy of the Report of the Examiner of your Income Tax Return. It is an important document and should be carefully preserved," and a letter upon the stationery of the Treasury Department, Internal Revenue Service, dated 528 Republic Building, Seattle, Washington, July 8, 1932, addressed to W. D. Gross, Juneau, Alaska, headed "In re: Income tax. Date of Report: June 21, 1932. Years Examined: 1930," and stating in substance that "enclosed is a copy of the report covering examination recently made by a representative of this office concerning your income tax liability which is furnished for your information and files," and that no remittance should be made until notice of assessment, and requesting acknowledgment, and signed by "Geo. C. Earley, Internal Revenue Agent in Charge," to which letter are attached 36 sheets of typewritten matter, giving a detailed statement of the Internal Revenue Bureau's adjustment of the defendant's Income Tax Return, and concluding with a printed form reading: "W. D. Gross, Statement of Total Tax Liability. Year 1930. Tax Previously assessed \$111.94. Adjustments proposed in accompanying report: Deficiency, \$2,056.09. Correct Tax Liability \$2,168.03."

(Testimony of James C. Cooper.)

And to the refusal in evidence of its said exhibits Nos. 43 and 44 for identification, plaintiff duly excepted. [626]

Thereupon Witness Cooper further testified: I made a thorough examination of the various figures disclosed by defendant's exhibits Series H, Series I, and Series K; I didn't keep track of the time I devoted to each individual item, but I have been working for the last seven days and nights, making analyses as well as checking over the schedules that were submitted to us; I found in that examination that the receipts, as shown on defendant's exhibits Series I and Series K, were substantially the same as shown in defendant's Series H; but in my examination I found a large discrepancy between the items of expense, totalized in defendant's exhibits Series I and Series K, as compared with the items of expense as shown in those portions of defendant's exhibit Series H, that Witness Stabler stated might be termed a journal; I found an apparent under-statement of expenses for the year 1929 for the Juneau Theatre on defendant's exhibit K-1 as compared with defendant's exhibit H, of \$23,000.00 and for the Juneau Theatre for the year, 1930, shown on defendant's exhibit K as compared with those shown on defendant's exhibit H-2 and H-3 for a corresponding period of time, an apparent under-statement of expenses of \$34,371.20, and for the Juneau Theatre for the year 1931, shown on defendant's exhibit K-3, as com-

(Testimony of James C. Cooper.)

pared with [627] the corresponding time shown on defendant's exhibit H-3, an apparent under-statement of \$10,886.21, and for Juneau for the year of 1932, there is an apparent over-statement of expenses on defendant's exhibit K-4, as compared with defendant's exhibit H-3 of \$1,552.18; for the Ketchikan Theatre for 1929 there is shown on defendant's exhibit I as compared with exhibit H-6, an apparent under-statement of expenses of \$15,681.58, and for Ketchikan for 1930, an apparent under-statement of expenses shown on defendant's exhibit I-1 as compared with exhibit H-6, of \$14,428.29; and for Ketchikan for 1931, an apparent under-statement of expenses shown on exhibit I-2 as compared with exhibit H-6, of \$5,970.39; and for Ketchikan for 1932, an apparent under-statement of expenses shown on exhibit I-3 as compared with exhibit H-6, of \$1,810.91; I have had prepared under my supervision charts graphically showing the receipts, expenses, profits and losses of defendant's Juneau and Ketchikan Theatres, as shown on his exhibits Series I and Series K for the period from January 1, 1929, to May 1, 1931; the source of the data shown on these charts was defendant's exhibits Series I and Series K, and are true graphic representations of the figures shown on those exhibits; the red line or top line indicates receipts or income; the blue line indicates the amount of expenses; the difference between them represents profits or if there is no profit, loss; the years are

(Testimony of James C. Cooper.)

indicated at the bottom of the charts, the months by a vertical line, each vertical line representing a month; the months are written in at the bottom; the amounts of money are shown on the left-hand side; the profit is the difference between the red and blue lines and in two instances, February, 1931, and April, 1931, for Juneau the blue line crosses the red line indicating losses, that the expenses were larger than the income; there is one chart for Juneau and one for Ketchikan.

Whereupon said charts were received in evidence, marked plaintiff's exhibits 49-A and 49-B, respectively.

Cross Examination

Thereupon Witness Cooper further testified: These graphs, plaintiff's exhibits 49-A and 49-B are graphs of defendant's exhibits [628] covering the whole series of defendant's exhibits I and K; I said that the receipts in defendant's exhibits Series I and K are substantially as shown in defendant's exhibit Series H; I found a difference in the expenses reported in the defendant's exhibit Series I and K as compared to those reported in Series H; in calculating those expenses I took into consideration the totals as shown by the monthly tabulations in defendant's exhibits Series H, leaving out none but taking the figures as they were reported by the tabulations at the end of each month; I charged the defendant's apartments and other outside concerns with part of the expense; I credited

(Testimony of James C. Cooper.)

the theatre expense with a sum equal to the income of the apartments, less depreciation or to make it plainer, I deducted from the total expenses, as shown by those monthly tabulations a sum equal to the income from the apartments less depreciation; I assumed that the Gross Apartments paid their own way; I don't know whether some of those apartments were built during those years or whether the cost of building them went into some of those items; I know nothing about that or about the cost of any other things that might have come in there; I have merely taken the figures as they appeared in the tabulations in defendant's exhibits Series H; I know nothing about the items except as they themselves were headed. If a lot of those items were expenses incurred in connection with other enterprises and they had nothing to do with the theatre, then my figures would be incorrect to that extent; I am not informed on the subject as to what items belonged to the theatre's expenses and know nothing about it but merely took the distributions as they are headed in defendant's exhibit Series H as representing the items that they are labelled to represent; for instance a heading is labelled "Wages", or "Light", "Oil", "Film", "Insurance", "Gross Expense", "General Expense", "Traveling", "Advertising", "Repairs", "Freight", "Charity", "Taxes",—I have merely taken those figures as being what they are called to be in those tabulations; I had no way of determining whether or not they were in theatre expense; [629]

(Testimony of James C. Cooper.)

I testified to some mistakes in addition that I found in defendant's exhibits Series I and K, which were proved by adding machine; some of those mistakes were over-statements, some under-statements, but they do not balance, the under-statements exceed the over-statements; I followed the same procedure in checking these exhibits in respect to both the Juneau and Ketchikan Theatres; all I knew about the items is as they are marked in the tabulation or distribution in exhibit Series H; I had no supporting documents offered to support any of the items contained in defendant's exhibits in respect to either theatre; they could have been supported either by an invoice of supporting papers, or by the person who made the payments provided that he was truthful; the net difference in those mistakes in addition, in Juneau is an under-statement of \$1,280.13, and in Ketchikan of \$102.11.

Whereupon the following proceedings took place:

“Q. If you had the man who made the payments and told you about these, you would know, if he were truthful.

A. If he were truthful, certainly.”

Redirect Examination

Whereupon Witness Cooper further testified: In checking for those mistakes in addition I went over defendant's exhibits Series I and K rather hurriedly and there may be other mistakes of that kind but I could't say as to that; I used the word “understatement” meaning that the expense was shown less than it should have been. [630]

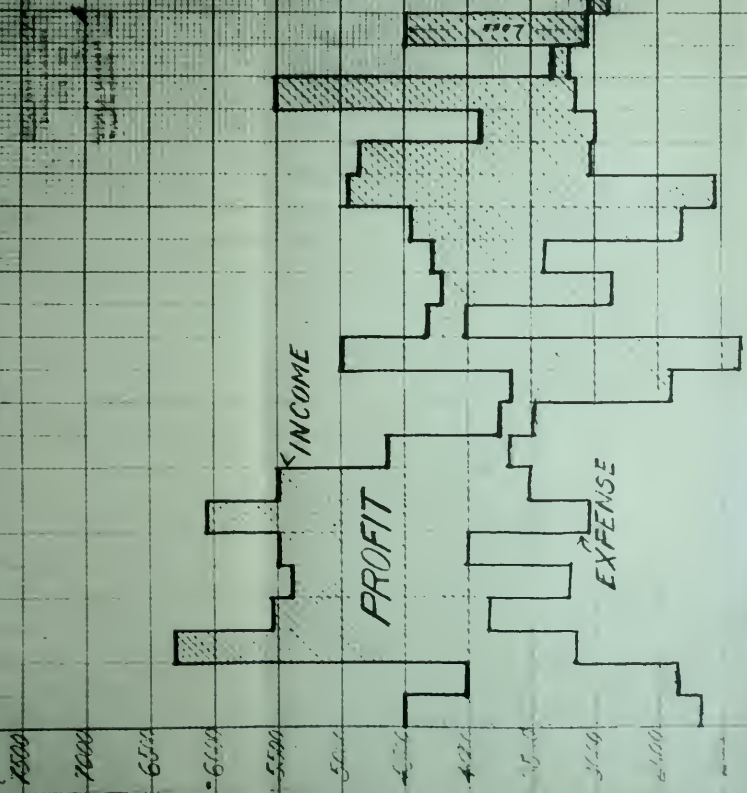
COLISEUM THEATRE ATTORNEY



1929 X 1930 X 1931

1929 Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec 1930 Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec 1931 Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec

COLISEUM THEATRE JUNEAU



1929 X 1930 X 1931

July Aug Sept Oct Nov Dec Jan Feb Mar Apr May Jun Jul Aug Sept Oct Nov Dec Jan Feb Mar Apr

(Testimony of James C. Cooper.)

Mr. ROBERTSON: I now offer in evidence the exhibit marked "53" for identification, being a copy of the income tax papers produced by the defendant, for 1932.

Mr. HELLENTHAL: Object to this offer for the reason it is irrelevant, incompetent and immaterial—the further reason that it is not a record and can be used for no other purpose in the case^s except for the purpose of impeachment; that the offer was submitted to counsel for that purpose, so that he might cross-examine Mr. Tuckett, who made the income tax report, while he was on the stand and was then here, and used for that purpose and Mr. Tuckett admitted on questions asked of him concerning it and afterwards explained the situation, so that there was nothing to impeach him on, and for the further reason that the Witness Tuckett has since left the Territory and since explanation cannot be made now counsel being advised at that time Mr. Tuckett was about to leave, and further reason counsel for the defendant offered the income tax returns in evidence while the Witness Tuckett was here and on the stand so that he might explain them, whereupon counsel for the plaintiff objected to them and the objection was then by the court sustained, so he is now estopped from claiming anything under these income tax returns whatever; the further reason they are in-

(Testimony of James C. Cooper.)

competent, irrelevant and immaterial; and it is not proper rebuttal.

The COURT: Objection sustained.

Mr. ROBERTSON: Exception.

Be it further remembered, that when the copy of defendant's income tax reports, attached to and embodied in the offer marked for identification as plaintiff's exhibit No. 43, and the copy of defendant's income tax report embodied and attached to the offer marked for identification as plaintiff's exhibit No. 44, and the copy of defendant's income tax report attached to and embodied in the offer marked for identification as plaintiff's exhibit No. 53, were offered in evidence by the defendant while the witness Tuckett was on the stand, it was understood by Court and Counsel on both sides that the witness Tuckett was about to leave the Territory for Portland, Oregon.

And be it further remembered, that when the plaintiff offered in evidence what is marked as plaintiff's exhibits Nos. 43, 44, and 53, it was known to Court and Counsel on both sides that the witness Tuckett had departed from the Territory of Alaska.

[633]

PLAINTIFF'S EXHIBIT 53

for identification is as follows: printed form of the Treasury Department, Internal Revenue Service, and is headed: "Individual Income Tax Return—For Net Incomes from salaries or Wages of More Than \$5,000.00 and Incomes from Business, Pro-

(Testimony of James C. Cooper.)

fession, Rents, or Sale of Property—For Calendar Year 1932—W. D. Gross & Wife, Juneau, Alaska—Occupation, Business, or Profession Theatre Business.”

“Item and
Instruction No.

“ 2. Income from Business or Profession	\$42,364.94
“18. Other Deductions not Reported Above	36,987.91
“19. Total Deductions in Items 13 to 18 (Depreciation)	22,440.68
“21. Less: Net loss for 1931	17,063.65”

Upon the face of the printed form is written in typewriting “(Note Attach Statement)”, Attached to the printed form and a part of said exhibit are the following typewritten statements, including the hereinafter quoted printed form of letter from “Geo. C. Earley, Internal Revenue Agent in Charge” to “W. D. Gross and Wife”, namely:

“This office is recommending to the Commissioner of Internal Revenue that your income tax returns for the year or years indicated be accepted as correct.

“I am sure you will appreciate that this action is subject to approval in Washington, and also that should subsequent information be received which would materially change the

(Testimony of James C. Cooper.)

amount reported, the Bureau is obliged under existing laws to redetermine your tax liability.”

which letter is dated Seattle, Washington, July 26, 1933, and is headed: “In re Income Tax—Years Covered: 1932”.

INCOME TAX REPORT FOR THE YEAR 1932

Summary of Business Done by W. D. Gross Including Theatre Receipts, Profits, Expenses, etc. and Depreciation for the Year 1932—

[634]

B-B-B

Total profit before deductions	\$42,364.94
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A-A-A

Film rentals, repairs, replacements, freight, advertising paid by Alaska Film Exchange	36,987.91
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Net profit before deducting depreciation	\$ 5,377.03
---	-------------

C-C-C

Depreciation for year 1932	\$22,440.68
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Net loss 1932	\$17,063.65
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Total profit (loss) from all theatres, rents, etc. before deducting film rental, depreciation and etc.

(Testimony of James C. Cooper.)

	Profit	Loss
A-A Douglas	\$ 1757.94	
A-B Haines Coliseum		\$ 205.21
Haines Light Plant	434.20	
A-C Juneau Coliseum	5864.28	
Rentals	12063.50	
A-D Ketchikan Coliseum	8160.74	
A-E Petersburg Coliseum	2994.94	
Rentals	1038.91	
A-F Sitka Coliseum	4572.38	
A-G Wrangel Coliseum	4626.29	
A-H Seattle, Rentals	1056.97	
	<hr/>	<hr/>
Totals	\$ 42570.15	\$ 205.21
Net Total before Deductions	\$ 42364.94	

A-A-A

1932—

Alaska Film Exchange
Juneau, Alaska

Total Cost of Films

 Paid for by Alaska Film Exchange \$28132.69

Total Cost of Film

 Paid for by Coliseum Theatre
 Ketchikan, Alaska 4783.33

Total Cost of Film

 Paid for by Coliseum Theatre
 Juneau, Alaska 2265.54

Repairs, Replacements, Freight

 Advertising Paid for by Alaska Film Exchange 1806.35

 Total Film Cost Plus Repairs and Etc.

\$36987.91

[635]

(Testimony of James C. Cooper.)

C-C-C

DEPRECIATION 1932

From all Sources

	Reserve Claimed 12/31/31	Depreciation Claimed 12/31/32	Reserve 12/31/32
A-C-1 Juneau, Alaska	3719.84	1484.92	5204.76
A-C-2	2837.69	1174.22	4011.91
A-C-3	7800.00	650.00	8450.00
A-C-4	3200.00	400.00	3600.00
A-C-5	13800.00	1150.00	14950.00
	6800.00	850.00	7650.00
A-C-6	14700.00	2100.00	16800.00
A-C-7	3900.00	1300.00	5200.00
A-C-8	2291.68	—	2291.68
A-C-9	200.00	300.00	500.00
A-C-10	50.00	200.00	250.00
A-D-1 Ketchikan, Alaska	21453.08	1726.54	23179.62
A-D-2	10060.29	1117.78	11178.07
A-D-3	12721.13	7.98	12729.11
A-D-4	5000.00	—	5000.00
A-D-5	2291.68	—	2291.68
A-D-6	200.00	300.00	500.00

A-C

COLISEUM THEATRE

Juneau, Alaska

1932

Receipts \$ 27379.46

Expenses (without films)

Salary, Wages	\$ 5490.82
Advertising (Newspaper & Etc.)	1878.05
Fuel, Oil	2509.01
Lights (Elec.)	2090.14
Freight	766.55
Interest	2965.50
Gen'l Expense	1378.70

(Testimony of James C. Cooper.)

Repairs	2815.21
Insurance	379.95
Taxes (City)	794.00
Travel	447.25

Total expense without Deducting film rental	\$ 21515.18	\$ 21515.18
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Total profit before Film deductions		\$ 5864.28
		[636]

1932 Juneau Rents Collected**	\$ 12063.50
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Total Profit from Rental	\$ 12063.50
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A-D

COLISEUM THEATRE

Ketchikan, Alaska

1932 Receipts	\$ 14920.49
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Expenses (without films)

Wages, Salary	\$ 3222.00
Freight	253.22
Oil, Fuel	516.70
Light (Elec.)	946.92
Gen'l Expense	306.46
Advertising	1198.29
Interest	229.60
Insurance	86.55

Total Expense without Deducting Film Rentals	\$ 6759.75	\$ 6759.75
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Total Profits before Film Deductions	\$ 8160.74
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(Testimony of James C. Cooper.)

A-C

Juneau, Alaska

Depreciation 1932

	Value	Acquired	Rate	Reserve Claimed 12/31/31	Reserve Claimed 12/31/32	Reserve 12/31/32
A-C-1						
Gross Apt.	\$29698.35	1929	5%	\$ 3719.84	\$ 1484.92	\$ 5204.76
Land	\$2000.00					
A-C-2						
Furniture	\$ 5870.93	1929	20%	\$ 2837.69	\$ 1174.22	\$ 4011.91
A-C-3						
Grand Building	\$13000.00	1920	5%	\$ 7800.00	\$ 650.00	\$ 8450.00
Land	\$5000.00					
A-C-4						
Forest Bldg.	\$ 8000.00	1924	5%	\$ 3200.00	\$ 400.00	\$ 3600.00
Land	\$6000.00					
A-C-5						
Coliseum	\$23000.00	1921	5%	\$13800.00	\$ 1150.00	\$14950.00
Land	\$5000.00					
	40000.00	1924	5%	\$ 6800.00	\$ 850.00	\$ 7650.00
Addition Reductions						\$17000.00
						[637]
A-C-6						
Furniture, Fixtures	\$21000.00	1925	10%	\$14700.00	\$ 2100.00	\$16800.00
A-C-7						
Organ	\$13000.00	1929	10%	\$ 3900.00	\$ 1300.00	\$ 5200.00
A-C-8						
Sound						
Equipment	\$11000.00	1929	10%	\$ 2291.68	—	\$ 2291.68
Carried as assets until Court decides <i>Notest.</i> 12/31/31—A-C-8.						
A-C-9						
Sound						
Equipment	\$ 3000.00	1931	10%	\$ 200.00	\$ 300.00	\$ 500.00

(Testimony of James C. Cooper.)

A-C-10

Valentine

Property	\$ 4000.00	1931	5%	\$ 50.00	\$ 200.00	\$ 250.00
Land	\$4000.00					

A-D-

Ketchikan, Alaska

Depreciation 1932

	Value	Acquired	Rate	Reserve Claimed 12/31/31	Depre. Claimed 12/31/32	Reserve 12/31/32
A-D-1						
Coliseum	\$34530.79	1923	5%	\$21453.08	\$ 1726.54	\$23179.62
Land	\$8000.00					

A-D-2

Kimbal Organ	\$11178.07	1923	10%	\$10060.29	\$ 1117.78	\$11178.07
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A-D-3

Furniture &

Fixtures	\$12729.01	1923	10%	\$12721.13	\$ 7.98	\$12729.01
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A-D-4

Machinery	\$ 5000.00	1922	10%	\$ 5000.00	—	\$ 5000.00
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A-D-5

Sound Equip-

ment W E	\$11000.00	1929	10%	\$ 2291.68	—	\$ 2291.68
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Note carried as assets until Court decides statement 12/31/31 A-D-5

A-D-6

Sound

Equipment	\$ 3000.00	1931	10%	\$ 200.00	\$ 300.00	\$ 500.00
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ADA W. SHARPLES

Ada W. Sharples, plaintiff's witness, being first duly sworn, testified:

Direct Examination

I am a stenographer and have done reporting of depositions, hearings, and things of that kind and now work for Attorney H. L. Faulkner, having been engaged in stenographic work for about twenty years; on March 16, 1932, in the Clerk's office of this Court, I reported the defendant's testimony in his deposition that was taken by Attorney Robertson on behalf of plaintiff in this suit before Deputy Clerk Leivers, at which time I took down defendant's testimony as he gave it, in shorthand; defendant's attorneys Si Hellenthal and H. L. Faulkner were present at that time and Attorney Robertson was present, representing plaintiff; after taking defendant's testimony I transcribed my notes and reduced it to typewriting, making a true transcript of my notes to the best of my knowledge and ability; I took down defendant's deposition in shorthand correctly so far as I know; I made a certificate on March 31, 1933, after I transcribed his evidence.

To the question propounded defendant in his deposition, "I now ask you to state, Mr. Gross, when he made that threat to you" he answered: "He made that threat when I received letters to settle the service charges, and after I decided to pay the service charges, he said before witnesses, that

(Testimony of Ada W. Sharples.)

he would see if I paid the service charges, he would have a man stationed at Juneau and one at Ketchikan. On the strength of that I paid the service charges." I believe they are a true transcription of my shorthand notes that I took at that hearing.

[639]

To the question propounded defendant in that deposition, "Is that the only conversation you ever had with Mr. Gage that he made any threats?" he answered: "That is the only conversation, when he sent for me to sign this paper and pay the money, otherwise they would take the machines out or attach the machines." I believe they are a true transcription of my shorthand notes as taken at that hearing.

To the next question propounded to defendant in that deposition, "That is the only conversation?" he answered: "Yes, I paid him on the strength of that." I believe they are a true transcript of my shorthand notes taken on that occasion.

To the question propounded to defendant Gross in that deposition, "Now, Mr. Gross, prior to that, that would be some time about, say four or five months after you got your sound reproducing equipment installed in your Juneau and Ketchikan Theatres, prior to that four or five months you never had any idea or knowledge that there were going to be any charges for inspection or inspection charges for making minor adjustments?" he answered: "That is correct." I believe they are true

(Testimony of Ada W. Sharples.)

and correct transcriptions of my shorthand notes taken on that occasion.

The next question propounded to defendant in that deposition, "Are you absolutely confident?" to which he answered: "I am sure," I believe also are true transcriptions of my shorthand notes taken at that time.

Cross Examination

Thereupon Witness Sharples further testified: That deposition was taken in 1932 in the Offices of the Clerk of this Court; defendant is somewhat of a hard man to understand, sometimes it was difficult for me to understand his answers; it is possible that there is a word wrong in this deposition; I couldn't [640] possibly remember now what happened right after he gave the answer to the first question to which plaintiff's attorney referred in my foregoing testimony, but in the deposition I transcribed it shows that immediately thereafter plaintiff's attorney said, "Wait, Mr. Gross, I move to strike out all that part of his answer as not responsive except the first part where the witness said he made it by letters." It is possible defendant said in that answer, "Upon the strength of the threats I paid the service charges" instead of "On the strength of that." The notes I took at that time have been destroyed; the certificate I made to the deposition was only a year ago last March; defendant never signed nor read the deposition so far as I know.

(Testimony of Ada W. Sharples.)

Redirect Examination.

Thereupon Witness Sharples further testified: I delivered a copy of the deposition to defendant's attorney, Si Hellenthal, at the same time I delivered a copy to plaintiff's attorney Robertson; I transcribed my notes on the same day I took the deposition; to the best of my recollection they are correct as I heard the testimony and reported it at that time. [641]

M. E. MONAGLE

M. E. Monagle, plaintiff's witness, being first duly sworn, testified:

Direct Examination

I am an attorney-at-law associated in the law business in Juneau with plaintiff's attorney, R. E. Robertson; I recognize this document defendant's exhibit A which was served by me upon Witness Charles Tuckett on March 10, 1931, when I took along as a witness to the service, R. E. Lawrence, who stood by while I read the document to Tuckett and then handed it to him; I first asked for defendant in order to serve it upon him but he wasn't there; I think Tuckett said that defendant was out of town or out of the theatre; we stood around talking; he said the equipment was all right and he didn't see any reason why defendant didn't pay, that defendant had told him he was going to make

(Testimony of M. E. Monagle.)

out a check a number of times, that he, Tuckett, hated to have me running over there all the time but he would get hold of defendant and get the money and pay it; I recall the time of day on which this replevin suit was brought; Witness Lawrence and I accompanied Deputy Marshals Martin and Newcomb when they went down to the theatre to serve the writ of replevin; Attorney Robertson did not go there at that time but came over between 4:15 and 4:30 o'clock, having been sent for by United States Marshal White; I was there part of the time while Attorney Robertson was there; the first time that I was there I left to get Marshal White; I arrived there about half-past two and stayed until about four; Attorney Robertson was not there during any of that time; when we got there Tuckett was the only one there and he was writing a letter; the marshal informed him he had come to disconnect the equipment and Tuckett said he would like to have [642] time to talk to defendant and went and got defendant; we stood in the office all the time; when defendant came he refused to give them the keys to the booth where the equipment was; it was locked up; there was quite a bit of howling around there and the deputy seemed to be afraid he might be exceeding his authority and asked me about the writ; I told him it was perfectly all right, it was a Court Order and it was up to him to do what the Court said; Deputy Marshal Newcomb told defendant if he didn't open the door

(Testimony of M. E. Monagle.)

he would break it in; Newcomb went out to get a pinch bar, came back and said he couldn't get one and tried to get Marshal White over the phone and said he couldn't get him; I imagine that was about a quarter after four; I went out and got Marshal White to go down there; I arrived back there just as Marshal White asked Attorney Robertson if the writ was all right; defendant had his attorney, Simon Hellenthal, and he arrived there just after defendant came in; Attorney Hellenthal stayed there until after Marshal White threatened to put them all in jail if they didn't behave themselves; during that time Attorney Robertson did not call defendant, Tuckett, or any of defendant's employees any names of any kind; he told Marshal White that the writ was all right, it was a Court Order, and to go ahead and do his duty; Attorney Robertson left a minute or two after I came back the second time; Deputy Marshal Newcomb threatened to break down the door to the booth but didn't do anything and United States Marshal White told them if they wouldn't open the door he was going to put them all in jail and then break the door in, that the writ directed him to it; those two are the only ones that made any statement or did anything. [643]

N. A. ROBINSON

N. A. Robinson, plaintiff's witness, by deposition duly taken August 16, 1932, testified:

Direct Examination

I reside at 1722 Durango Street, Los Angeles, California; I have held the following positions with plaintiff; installation engineer, service engineer, district service supervisor, division service superintendent, technical inspection superintendent, operating manager; I am familiar with the agreements dated March 28, 1929 (plaintiff's exhibits Nos. 1 and 3) and the supplemental agreements dated September 4, 1929 (plaintiff's exhibits Nos. 2 and 4) signed by the parties hereto, and referred to in the first and second causes of this action relative to certain sound reproducing equipments in the defendant's motion picture theatres at Juneau and Ketchikan, Alaska; plaintiff's Western Division, operating department, service, technical inspection and installation branches had charge of the installment of said equipments and the carrying out by plaintiff of the terms of those four agreements; plaintiff kept official records of what it did to perform the terms of those and of similar or analogous agreements and of the condition of the sound reproducing equipments in defendant's Juneau and Ketchikan theatres and in other theatres; I was in charge of that division during 1929, 1930, and 1931, and the operations of that branch or division are under my supervision or control and the official

(Deposition of N. A. Robinson.)

records of that division and of those operations are in my charge; on behalf of plaintiff, Harry Taylor, E. V. Smith, D. Knowlton, F. Foulon, R. Lawrence, R. C. Little, E. S. Tobey, G. I. Albright, and J. B. Darragh, Jr. made inspections of and minor adjustments in the sound reproducing equipments in defendant's theatres in Juneau and Ketchikan, Alaska, during the time that those equipments were in those theatres; those men are qualified sound engineers by experience and training, and graduates of technical schools, and also graduates of a special course given by this company in the maintenance and installation of sound [644] picture equipment; they were all over twenty-one years of age; before employing them, plaintiff ascertained they each had those qualifications; their duties were the installation and servicing of sound picture equipment; they were instructed to and they did make written reports of what they found or did upon their visits to the defendant's theatres in Juneau and Ketchikan, to their respective supervisor and to the theatre management; the Western Division operating department which is under my control, has charge of the keeping of those reports; those reports that I know of are now on file in this case, attached to the depositions of J. B. Darragh, Jr., F. Foulon and D. Knowlton, the carbons having been secured from the files of the company for attachment to the deposition of the respective engineers; Darragh, Albright, Knowlton and Lawrence are still in plain-

(Deposition of N. A. Robinson.)

tiff's employ; it was plaintiff's practice from the time the equipment was installed until it was removed, to have an employee regularly stationed in Alaska to make inspections and adjustments as frequently as required to keep the equipment in defendant's motion picture theatres in Juneau and Ketchikan operating satisfactorily; from July 11, 1930, until the equipment was removed from the theatres, plaintiff maintained a stock of service parts or materials in both Juneau and Ketchikan for use in connection with inspecting and making minor adjustments in the equipments in defendant's motion picture theatres, and plaintiff's engineers at all times carried a stock of spare parts with them; the purpose of maintaining said stock was to protect equipment against possible failure; spare 41 type amplifier was kept at Ketchikan; spare 42 type amplifier was kept at Juneau; in addition to the materials listed in the emergency material parts for engineers' kits; the following items were carried at all times by engineers in servicing equipment: 1 P-222520 cushion assembly modified, 1 TA-7049 coupling, 1 D-48560 condenser, 1 189048 tungar [645] bulb, 2 3-A photo electric cells, 6 8-volt 4½ ampere exciting lamps, 3 239-A vacuum tubes, 1 205-D vacuum tube; I now produce said list of emergency material parts for engineers' kits.

Whereupon said list was received in evidence marked plaintiff's exhibit No. 46, which consists of an itemized list of said parts.

(Deposition of N. A. Robinson.)

Whereupon Witness Robinson further testified: all of said stock was available for use in defendant's theatres and a number of small parts such as tubes and other items were furnished both theatres from the stocks carried by the engineers; I did not see the defendant at any time during the period from September 1, 1929, to February 10, 1930; I wrote the letter (defendant's exhibit No. F-6) to defendant Gross on June 11, 1930, with the thought of placing a service arrangement in effect which would better insure against interruptions at the Coliseum Theatres in Juneau and Ketchikan; we never received an answer to our letter so assumed that defendant did not wish to adopt the suggestions contained therein; no agreement was entered into with Gross as a result of said letter. [646]

PLAINTIFF'S EXHIBIT NO. 46

reads as follows:

RESTRICTED DISTRIBUTION— 8.34

ERPI PERSONNEL ONLY

ELECTRICAL RESEARCH PRODUCTS INC.

Equipment Bulletin

Emergency Material Parts for Engineers' Kits

Replacing Service Bulletin #36, File 8.34

1. Purpose

- 1.1 To list the "Emergency Material Parts" to be carried by Engineers regularly servicing installations and to outline the routine for obtaining and disbursing these parts.

(Deposition of N. A. Robinson.)

1.2 To revise the information contained in Service Bulletin #36, File 8.34 which may now be destroyed.

2. General

2.1 One set of "Emergency Material Parts" consisting of the parts and quantities as hereafter outlined will be provided for each Engineer regularly servicing installations, and such Engineers as may be selected by the local supervisory personnel, to be carried in the regular Service Kit case. "Emergency Material Parts" loaned to Engineers are considered as a part of the Emergency Stock of the Branch Office to which they regularly report. The original parts and replacements for disbursed parts are to be obtained from that Office.

2.2 In the event an Engineer is transferred, the "Emergency Material Parts" are to be returned to the Office from which they were obtained, and if a set of parts is required in his new location they will be furnished by the new Office.

3. Parts

3.1 The "Emergency Material Parts" are divided into two classes—"Billable" items and "Non-billable" items.

3.11 "Billable Items". The following parts when replaced in an installation from

(Deposition of N. A. Robinson.)

“Emergency Material Parts” are billable to the Customer at the installed price. A part replaced on a full price basis should be destroyed locally, on a free replacement it must be returned to the Stores Division on a R.G. Tag. The customary provisions covering free replacements shall apply to these parts.

Quantity	Material
1	Condenser, 95-D (43-A, 10-A Amplifier, etc.)
8	Condensers, D-92583 (Replaces 21-CB).
1	Gear, Fibre P-220741 (For 707-A Drive).
4	Brushes, 3511946 (For KS-5161 Motor).
4	Brushes, 260682 (For KS-5260 and 5258 Type Motors).
4 ^o	Film Guide Rollers, P-221124 (For 1 Type Sound Unit).
2 ^o	Adjusting Nuts, P-221123 (For 1 Type Sound Unit).
1 ^o	Pinion Gear, P-220729 (For 712-A Drive).
2 ^o	Guide Rollers, P-217241 (For D-Spec Att.).

[647]

^o Material not included in former Bulletin.

^{oo} Formerly 1 Film Guide Roller Assembly (Det. 6A-ESO 318880) was provided. Parts of the assembly not provided for by the Bulletin will *not* be replenished after the present supply is exhausted

3.111 It is suggested that the Engineer automatically return to the Branch Office six of the D-92583

(Deposition of N. A. Robinson.)

Condensers immediately upon equipping all of the 42 and 46 Type amplifiers in his territory with D-Spec condensers. (See Equipment Bulletin—"Condensers, D-92583 and 181-A", File 4.05). As the condensers are then to become a part of the regular Emergency Stock, the Branch Office should anticipate their return to prevent an over-stock of this item.

3.12 "Non-Billable Items". The following parts when disbursed from "Emergency Material Parts" in the Field, may be supplied without charge to the Customer. The replaced parts are to be destroyed locally.

Quantity	Material
4	Resistors-Durham Metalized, KS-6376 (0.5 Megohm).
4	Resistors-Durham Metalized, KS-6376 (10.0 Megohm).
2	Springs, Leaf (Ends) Det. 7-ESO-320735, (For 707-A Drive).
2°	Springs, Leaf (Center) Det. 8-ESO-320735, (For 707-A Drive).
2	Clips, Leaf Spring, Det. 4 ESO-320735, (For 707-A Drive).
1°	Steel Disc, P-220739 (For 705-A Shaft).
6°	Screws, P-215620 (For 705-A Shaft).
6°	Lockwashers, P-221021 (For 705-A Shaft).
4°	Springs, P-223374 (For Film Chute).

(Deposition of N. A. Robinson.)

- 12° Machine Schews 1/2", No. 2-56 R.H. Steel Nickel Dip (For Film Chute).
- 12° Hexagonal Nuts, No. 2-56 Steel Nickel Dip (For Film Chute).
- 6 Chain Links (5-B-2) Chain.
- 6 Washers, Rubber P-213995 (For 1-A Rep. Arm).
- 6 Screws, Bristo, Large 5/16" x 18 x 5/16".
- 6 Screws, Bristo, Small 3/16" x 32 x 3/16".
- 6 Screws, Headless Set, Guide Roller Shaft, .138"—32 x 5/16" Cup P-217337.
- 6 Screws, Holding Retaining Collar RHIMS, .125"—40 x 1/4" P-224271 (1-A Sound Unit).
- 6 Screws, Reproducer Needle Holder P-211555.
- 6 Screws, Reproducer Mounting, D-212709, (For 4-A Rep.).
- 6 Screws, Special Tapered Dowel P-221006 Det. 10-ESO-318386 (Light Gate Carrier Frame Set Screw).
- 6 Screws, Guide Roller Collar RHIMS. .112"—36 x 3/16" P-221122.
- 6 Screws, P-157566 (For cover of 702-A Control Cabinet).

°Material not included in former Bulletin.

[648]

4. Disbursement of Parts

4.1 Engineers shall replace defective parts with material carried as "Emergency Material Parts" whenever applicable on routine, appointment or emergency calls.

4.11 All "Billable items" supplied from the "Parts Kit" must be covered by an S.D. Order and the order marked "Confirming delivery from kit".

(Deposition of N. A. Robinson.)

4.12 All "Non-billable" items supplied from the "Parts Kit" should be listed on the call report. An S.D. Order shall not be issued.

4.2 When Customers request a quantity of any item carried as a part of "Emergency Material Parts", the items should not be disbursed from the kit, but should be ordered according to the regular ordering procedure in effect at the installation, i. e., S.D. Order or Call Report Method, and the normal S.D. Order charge classifications shall apply. The "Non-billable" items are supplied on a no-charge basis *only* when disbursed from the "Emergency Material Parts" kit carried by the Engineer. If the same parts are ordered by the Exhibitor from either a Branch Office or the Stores Division for shipment direct to the installation, the Exhibitor will be billed.

5. Replenishments

5.1 "Billable Items" will be replaced to the Engineer upon receipt at the Branch Office, of the S.D. Order covering the disbursement from the Engineers' "Emergency Material Parts". The replenishments will be sent to the Engineers' home address unless he specifies another address on the reverse side of the S.D. Order. Shipment will not be made to an installation on the itinerary.

(Deposition of N. A. Robinson.)

5.2 "Non-Billable Items". When the Engineers' supply of "Non-billable" items becomes low, he should list on the back of the District Office Copy of a call report, the quantity, code number and description of all items required to bring his supply up to normal.

5.3 The Engineer shall sign and forward to the Branch Office the copy of the Journal Bill which accompanies the delivery of "Emergency Material Parts" from Branch Office Stock.

6. Branch Office Procedure

6.1 When material is shipped to an Engineer's "Emergency Material Parts" kit, Journal Bill Form ERPI 308 shall be originated in duplicate. (Any two copies may be used). It shall designate the Engineer's name and address, a description of the material and the number of the S.D. Order or the date of the Call Report requesting the shipment.

6.12. The original shall be sent with the material to the Engineer who will sign and return it to the Branch Office. Upon its return to the Office, it shall be filed in the T.I. & Service Kits folder, 8.34, of the General File. [649]

(Deposition of N. A. Robinson.)

- 6.13 The duplicate shall be used to post the stock Record cards (See 6.3) and then kept in the follow-up file until the original is received from the Engineer, after which it should be destroyed.
- 6.2 The spare stock of Engineers' "Emergency Material Parts" in Branch Office Emergency Stock shall be replenished by requisitioning from the Stores Division on "Authorization for shipment", Form ERPI 123 in the regular manner. However, "Non-billable items" shall be charged to W.O. #1017, while "Billable" items shall be charged to the regular Emergency Stock number of the Branch Office.
- 6.3 A record of all "Billable" items in Emergency Stock and issued to Engineers shall be kept by means of the stock record cards KP-1104. It is not necessary to originate cards for the "Non-billable" items, ordered against W.O. #1017.
- 6.31 *Two cards* shall be kept in the same pocket of the Kardex File for each "Billable" item that the Engineer carries. The first card to represent the material actually in Emergency Stock and the second card to represent material carried by Engineers.

(Deposition of N. A. Robinson.)

6.32 When "Billable" material is received from the Stores Division, it shall be posted in the regular manner on the first card. When "Billable" material is sent to the Engineer, it shall be posted on the *first* card showing shipment to kit, (Show "Kit" in space marked "Order No."), and on the *second* or Engineers' card showing the quantity shipped to kit (Show the Engineer's initials in the space marked Order No.).

6.33. When the Engineer supplies material to an installation and an S.D. Order is received in the Branch Office (In accordance with Paragraph 4.11), an Emergency Stock Shipping Order, Form ERPI 241 shall be originated and a number assigned in the regular manner. This disbursement by the Engineer shall be posted on the *second* card, showing shipment number in the space marked "Order Number".

6.34 The "on hand" columns of the first and second cards should indicate at all times, the total amount in Branch Office and in Engineers' Kits, respectively.

(Deposition of N. A. Robinson.)

6.4 It is not necessary to maintain a formal record of the "Non-billable" items other than the copies of requisitions and receipt of shipments from the Stores Division.

6.5 The inventory of Emergency Stock in each Office must include the billable items carried by Engineers. This total can be obtained from lists submitted by Engineers or from the second card. It is suggested that both figures be obtained for checking purposes.

TGW*MK

Page #4.

Issued by

Issue #1

Operating Dept.-Equipment Div. April 17, 1931

[650]

J. S. BRIGGS

J. S. Briggs, plaintiff's witness, by deposition duly taken August 26, 1932, testified:

Direct Examination.

I reside at 7737 - 19th Ave., N. E., Seattle, Washington; I have been employed by the plaintiff corporation as installation engineer in Virginia, Pennsylvania, and New Jersey from August to December, 1928; service engineer at Portland, Oregon, from December, 1928, to July, 1929; technical inspector in Oregon and Washington from July, 1929, to October, 1929; service supervisor in Seattle, Washington, from October, 1929, to March, 1931; senior engineer in Seattle, Washington, from March 1931, to April, 1931; technical inspector from April

(Deposition of J. S. Briggs.)

to May, 1931; and as service engineer stationed in Seattle, Washington, from May, 1931, to the present date; I have a bachelor of science degree in mechanical engineering from Oregon State College; since August, 1928, I have been engaged exclusively in the installation, inspection and service of Western Electric theatre sound reproducing apparatus; previous to my transfer to plaintiff I was engaged in the Western Electric Company's plant in Chicago, Illinois, since January, 1924, where my work was engineering connected with the design, construction and installation of special machinery and electrical apparatus; I know the defendant Gross; in response to the telegram,

DEFENDANT'S EXHIBIT NO. Q-1,

reading as follows:

Juneau, Alaska, Feb. 3, 1930.

R. H. Pearsall

Electrical Research Products Inc.

Los Angeles, Calif.

Check covering our account mailed twenty-eighth receipt bills return to Juneau What is the matter we can not get replacements on two three nine tube We have four coming none arrived yet At present we have no spare on this tube Must have spares also we are entitled to more than twenty minutes service per month which is about all we get.

Night Letter Collect

Coliseum.

(Deposition of J. S. Briggs.)

plaintiff took the following action about immediately sending a service man to Juneau, for the following reason; I received a wire [651] from Los Angeles from P. M. Walker in charge of service on the West Coast for electrical Research Products, Inc. in reference to the telegram sent February 3, 1930, to Pearsall, Electrical Research Products, Inc., Los Angeles, from Coliseum, Juneau, about replacements of tubes and also complaint on service; the wire from Walker which is the original wire received by me, I make a part of my answer here.

Whereupon said telegram was received in evidence marked

PLAINTIFF'S EXHIBIT NO. 45-A

and reads as follows:

Feb. 4, 1930.

J. S. Briggs, ERPI

458 Skinner Bldg., Seattle, Wash.

Coliseum Juneau wired us as follows quote what is the matter We cannot get replacements on two three nine tube We have four coming none arrived yet At present we have no spare on this tube Must have spares We have a loose connection in system somewheres When will service man arrive unquote Wire theatre status immediately and if necessary rush extra tube stop Advise.

P. M. WALKER.

(Deposition of J. S. Briggs.)

Thereupon Witness Briggs further testified: that wire did not ask for the immediate sending of a service man to Juneau, accordingly no such arrangements were made; it did inquire however, when a service man would arrive; I wired E. V. Smith, an engineer of the Electrical Research Products Inc., who was then in Cordova, Alaska, installing sound equipment there; a carbon copy of this wire, which I retained and which is a part of my office records, I now produce.

Whereupon said wire was received in evidence marked

PLAINTIFF'S EXHIBIT NO. 45-B

and reads as follows:

Seattle, Wn.

Feb. 4, 1930

E. V. Smith, ERPI Engr.

Empress Theatre

Cordova, Alaska

Coliseum Theatre Juneau advise have loose connection in system stop Also they have ordered four two thirty nine aye tubes stop Ess dee order has not been received but we are forwarding four tubes on boat leaving fifth stop Make sure we receive ess dee order stop According to Los Angeles you will service all Alaskan houses from now on.

Night Letter.

J. S. BRIGGS

[652]

(Deposition of J. S. Briggs.)

Whereupon Witness Briggs further testified: that wire was delivered into the hands of the Western Union Telegraph Company for transmittal to Smith via Alaska Cable; Smith replied to my wire that he could not come for six weeks to service the Juneau Theatre; I now produce his original wire and make it a part of my answer.

Whereupon the telegram was received in evidence marked

PLAINTIFF'S EXHIBIT NO. 45-D

and reads as follows:

Cordova, Als. Feb. 5, 1930

J. S. Briggs

ERPI Four Fifty Eight Skinner Bldg.,
Seattle.

Retel will be impossible to service Juneau or Ketchikan until installations are completed at Anchorage and Fairbanks which will be at least six weeks yet Regards.

E. V. SMITH

Whereupon Witness Briggs further testified: I had sent the wire (plaintiff's exhibit No. 45-B) to Smith for the purpose of acquainting him with the complaint of the Coliseum Theatre at Juneau and determining what action he could take in the matter as it had been the intent of plaintiff that he should do the servicing of theatres in Alaska, as well as

(Deposition of J. S. Briggs.)

the installing of new equipment; I also determined from schedules that a service engineer could be had in Juneau, Alaska, by February 12, 1930, and I so informed the Coliseum Theatre at Juneau by my wire to them of February 5, 1930; the carbon copy of this wire, which I retained and which is part of my office records, I now produce.

Whereupon said wire was received in evidence marked

PLAINTIFF'S EXHIBIT NO. 45-E,

which reads as follows:

Seattle, Wn.

Feb. 5, 1930.

Coliseum Theatre

Juneau, Alaska

Tubes shipped today Engineer arrives twelfth Advise nature loose connection.

Straight wire.

J. S. BRIGGS

Whereupon Witness Briggs further testified: that wire was delivered by me into the hands of the Western Union Telegraph Company in Seattle, for transmittal via Alaska Cable System to [653] the Juneau Coliseum Theatre; I make it a part of my answer here; a few days after February 5th I received a letter from the Coliseum Theatre at Juneau advising me that all their troubles had been straightened out; this letter which was the original

(Deposition of J. S. Briggs.)

letter received by me from the manager of the Coliseum Theatre at Juneau, is plaintiff's exhibit No. 41. [654]

Whereupon Witness Briggs further testified: as no engineer was then immediately requested, nor had any ever been immediately requested, I sent up a service man at the regular time, which was about February 22, 1930; as previously stated by me herein, the telegram of February 3, 1930 (plaintiff's exhibit 45-A) did not ask for the immediate sending of a service man to the Coliseum Theatre, Juneau, nor did it appear to be in serious trouble which would necessitate immediate aid of the service engineer; it was their custom, as it is the custom of theatre operators generally and especially of outlying theatres, to transmit a complete description of their trouble, if at all serious, to their closest service office; the Coliseum Theatre, Juneau, personnel were aware of this custom, as is shown by their wire of January 17, 1930, from this same theatre at Juneau, Alaska, in which is given a detailed description of a trouble the theatre was having; this wire, which is the original wire received by me, I now produce.

Whereupon said wire was received in evidence marked

(Deposition of J. S. Briggs.)

PLAINTIFF'S EXHIBIT NO. 45-C,

identical with one telegram in defendant's exhibit series No. N, and reads as follows:

Juneau, Als., Jan. 17, 1930

Electrical Research Products

458 Skinner Bldg., Seattle

We have a short in our equipment when we throw lever from film to disc we blow out fuse in battery room Cant use disc film side okay Advise how to find trouble must know as it is impossible to get service man here in time

COLISEUM THEATRE

Whereupon Witness Briggs testified further: the wire dated February 3, 1930 (defendant's exhibit No. Q-1) addressed to Pearsall in care of Electrical Research Products, Inc., Los Angeles, and signed "Coliseum", was referred to me through plaintiff's Los Angeles office instead of directly to the Seattle Office [655] from the Coliseum Theatre at Juneau, Alaska; the loose connection did not seem to be bothering them much, as the nature of it was not described in the telegram; however, as it would have soon been time to service these theatres again, I believed it advisable to service them as quickly as practicable; to this end I consulted schedules as to when this could be done; I found that February 12, 1930, was the earliest practical date and I so ad-

(Deposition of J. S. Briggs.)

vised the Coliseum Theatre at Juneau by wire, to which I have heretofore referred (plaintiff's exhibit No. 45-E) and to which I refer at this point; as previously testified to by me, I received only a few days after February 5th a letter from Charles Tuckett, manager of the Coliseum Theatre, Juneau (plaintiff's exhibit No. 41) indicating to me that they were in no need of immediate aid; they had not answered my wire of February 5, 1930, requesting them to state the nature of their trouble (plaintiff's exhibit No. 45-E) in order that we might correct it by wire; they informed me by this letter that their trouble was remedied; as their trouble was remedied, and as extra tubes had been shipped it was plain to see that it was not necessary to vary our regular call schedule by making a call sooner, nor did they request such; defendant's theatres were being serviced at regular periodical intervals and as no showing was made for emergency aid, or for the emergency sending of an engineer, an engineer was sent at the regular time and not to be there on February 12th as I had previously informed them; eighteen days after receipt of said telegram (plaintiff's exhibit No. 45-C), on or about February 22, 1930, I sent to Juneau Service Man E. S. Tobey, who had several years' experience in the design of and manufacture of radio sets and whom, when he was transferred to the Seattle territory, I gave a direct examination regarding servicing of our equipment, and also an examination

(Deposition of J. S. Briggs.)

on his general knowledge of electricity, and found him proficient in these matters; he had about one year's experience installing and maintaining Western Electric theatre sound systems; as supervisor of service of the [656] plaintiff company in the Seattle District I was in charge of service and I subsequently sent other service men to Alaska for the purpose of inspecting and making minor adjustments in the sound reproducing equipments in defendant's motion picture theatres in Ketchikan and Juneau; the names of those service men are F. Foulon, R. E. Lawrence and H. C. Hurlburt; I do not know their ages exactly but would judge them to be about 27 or 28, 32 or 33, and 26 respectively; as to their qualifications I know that all engineers hired by our organization for work on sound reproducing systems were hand-picked men; our personnel department, who hired them, investigated their qualifications thoroughly, going particularly into their technical knowledge and education and their experience in parallel fields; their references and personality were given careful consideration; a three weeks' training course was given to those hired, and men not passing the examination at the end of their course were dismissed; in order to insure that only high qualified engineers should service theatres, those were chosen from the installation engineers having the most experience and best all round qualifications and no engineer was taken direct from the training course and placed in serv-

(Deposition of J. S. Briggs.)

ice; Foulon was in Alaska from March 25, 1930, to September 11, 1930; Lawrence from October 7, 1930, to September 5, 1932; Hurlburt from December 22, 1930, to February 10, 1931; Foulon was permanently stationed in Alaska from March 25, 1930, to September 11, 1930; Lawrence was permanently located in Alaska from October 7, 1930, to April, 1932; Hurlburt was stationed in Alaska only for the period required to install one theatre in Juneau and one in Ketchikan; their duties were to inspect and make necessary adjustments to Western Electric Theatre Sound Equipments in service and to install new equipments; I was present, as well as J. A. Gage, during a conversation with defendant on or about April 2, 1930, in Gage's private office in [657] plaintiff's offices in Seattle, Washington; Mr. Gage called me into his office and explained that defendant objected to paying his back service charges on the ground that he was not receiving periodical service calls; defendant stated there were several periods when no engineer of plaintiff visited his theatre for over two months; I told defendant he was misinformed, and produced routine service call reports for every month in which the theatres were serviced; each report was signed by both the manager of the theatre and the engineer; defendant then stated that a service engineer was required due to a loose connection and one was promised on February 12, 1930, but none arrived until February 24, 1930; I then showed defendant his manager's

(Deposition of J. S. Briggs.)

letter dated February 5, 1930 (plaintiff's exhibit 41) already referred to in my testimony, saying the trouble was temporarily corrected by the theatre personnel which rendered it unnecessary to send an engineer before the regular service date; I now refer to that letter again at this point; this was the substance of the conversation had while I was present which was only a short time; no threats were made by me and to my knowledge no threats of any kind were made to defendant; I left the room before payment was made by defendant; I believe the amount was between \$500 and \$600 to be applied on service charges and merchandise charges; in December, 1930, or early in 1931 in plaintiff's offices in Seattle I had a conversation with defendant when he came in to interview one of the salesmen to attempt to have plaintiff to not lease equipment to Mr. Kubley who was opening a theatre in Juneau and one in Ketchikan; and as no salesmen were in I talked to him instead; defendant said he understood Kubley was leasing our equipment for one house in Juneau and one in Ketchikan; and he said there was not room for additional theatres in either Juneau or Ketchikan, also that Kubley was not financially [658] responsible and advised me it would be risky for plaintiff to do business with him; I told defendant I had nothing to do with sale of equipment or the credit of an exhibitor and then asked him when he expected to pay his back service charges to which he made no reply but laughed and

(Deposition of J. S. Briggs.)

left the office; no threats were made about removing the sound reproducing equipments from defendant's theatres in Juneau and Ketchikan. [659]

J. A. GAGE

J. A. Gage, plaintiff's witness, by deposition duly taken December 19, 1933, testified:

Direct Examination.

I reside at 6824 Linden Avenue, Seattle, Washington; I was employed by plaintiff as district sales representative for three years, to September, 1930; I have known defendant Gross from 1920 to the present date; I had negotiations with defendant Gross relative to his entering into agreements with the plaintiff for it to install sound reproducing equipment in both his motion picture theatres in Juneau and Ketchikan, Alaska.

Whereupon plaintiff propounded by deposition to Witness Gage the hereinafter mentioned questions and offered to prove the facts stated in said witness' respective answers to those questions; but defendant objected to each of said questions and to the proof contained in each of said respective answers upon the following grounds: that each of said questions was irrelevant, incompetent, and immaterial, tending to modify the terms of the contract which is in writing and attempting to testify to negotiations which led up to the contract and merged

(Testimony of J. A. Gage.)

into the contract, especially so in view of the provisions of the contract that there are no other contracts between the parties, also not rebuttal, and referred to contracts that had been revoked by the contracts of March 28, 1929.

The Court sustained said objections to each of said questions and answers, to each of which rulings plaintiff then and there excepted. Those questions and answers were as follows:

Q. How did those negotiations happen to be entered into?

A. Gross approached me and requested two sound reproducing equipments for the first possible dates they could be installed in both his Ketchikan and Juneau theatres.

Q. When did he first see you in that connection?

A. Approximately six months before he received his approved contract.

Q. Where?

A. On the street in the film exchange district located on Second Avenue in Seattle, Washington.

Q. Who was present besides you and Gross?

A. No one. [660]

Q. What, if anything, was done as a result thereof?

A. Two contracts were drawn and signed by Gross and submitted by myself to plaintiff for its approval.

(Testimony of J. A. Gage.)

Q. Did Gross sign any agreement or contract at that time relative to either or both his Juneau and Ketchikan theatres, and, if so, which?

A. Signed both.

Q. Was there one agreement for the two theatres, or a separate agreement for each theatre?

A. A separate agreement for each theatre.

Q. Where did he sign them?

A. Atwood Hotel, Seattle, Washington, in his rooms.

Q. When?

A. That night. I don't remember the date, it was approximately July 7, 1928.

Q. Who was present?

A. My wife and myself, Mr. and Mrs. Gross.

Q. Was any part of those agreements left blank?

A. Yes.

Q. How did that happen to occur?

A. It was impossible to designate the type or size of the sound reproducing equipment until our engineering department could survey the drawings of these theatres and determine the correct type and size for his needs, and it was not possible to determine the correct service charge at that time, although it was agreed that it would not be less than \$29.75 weekly.

Q. Did you have any authority at that time to execute those agreements on behalf of the plaintiff?

(Testimony of J. A. Gage.)

A. I had no authority to execute agreements on behalf of the Electrical Research Products, Inc.

Q. What did you do with those agreements?

A. I mailed them to Los Angeles for approval.

Q. What eventually did the plaintiff do with them?

A. Plaintiff eventually executed them.

Whereupon Witness Gage testified further: I subsequently talked with Gross about executing a supplemental agreement, dated September 4, 1929, relative to the service charge to be paid by him to plaintiff covering inspections and making minor adjustments in the sound reproducing equipment in his two theatres; I discussed [661] this matter with Gross two or three times over telephone and once on December 30, 1929, the time when said supplemental agreements were signed by defendant in the Seattle office of Electrical Research Products, Inc., and at which time a man named Hal Cawthorn was present; at that time Gross asked if his projectionists could service his equipment, stating that he would pay them, and I stated the company's policy would not allow this equipment to be serviced by anyone other than our own engineers; I did not make any threats to him that, unless he signed those supplemental agreements, plaintiff would remove or take out the sound reproducing equipment from his Juneau and Ketchikan theatres; Gross

(Testimony of J. A. Gage.)

came into my office to sign the supplemental agreement and also had with him blank checks on the Behrends Bank to pay the back service charges which were then thirty-one weeks in arrears; we conversed and Gross again asked that I take up with my home office the matter of having his own men service the equipment; I told him this had been done and the decision was final, that they refused to permit anyone outside of their own engineers to service the equipment; I didn't threaten him at all; I told him frankly that he must live up to the terms of his agreement or return the equipment; I said "If you don't want to carry out your agreement, all right." I used such illustrations as "if you do not pay your telephone bill, your telephone will be disconnected." I pointed out to him that in accordance with his contract he was already in default and that it was only our leniency that kept him going as long as he did; without undue persuasion he signed the agreement and paid for thirty-two weeks' back service charges, together with some small amounts, bills of approximately \$15.00; we discussed the question of payments and I told him that if he was to continue the use of the equipment he would have to perform all the provisions of the contract, including the payment of the weekly service charges; Gross said that he wanted to have his own projectionists service the equipment and [662] I advised him that the company's policy would not permit it; he agreed to be

(Testimony of J. A. Gage.)

more prompt in his payments; he signed the checks in blank and I filled in the amounts in his presence; I had mailed to Gross the supplemental agreement for his signature, but he had left Alaska for Seattle prior to receiving them, so he signed the originals that I had retained in my office and delivered them to me on December 30, 1929; Gross paid me for plaintiff money in payment of plaintiff's charges for inspections and making minor adjustments in the sound reproducing equipments in his Juneau and Ketchikan theatres on two occasions, in the office of Electrical Research Products, Inc., Seattle, Washington; on December 30, 1929, he paid me \$1979.60, which balanced both accounts and included payment for one week in advance, and on April 3, 1930, he paid me \$538.00 which covered back service and merchandise items due; I recall no specific conversation occurring on April 3, 1930, other than that defendant had continually at all occasions when I talked with him wanted to have his own projectionists service the equipment, and I continually told him that this could not be done and that the company's policy would not permit it; we also discussed the fact that if he wished to continue the use of the equipment, it would be necessary for him to continue his payments as he had agreed, including the payment of weekly service charges; Cawthorn was present on the first occasion, and on the second occasion, J. S. Briggs, service superintendent in the Seattle District, was present; no threats were made

(Testimony of J. A. Gage.)

to him on either occasion; after those supplemental agreements were signed by defendant and delivered by him to me, I sent them direct to New York to Mr. C. W. Bunn, general sales manager; I did not make any threats to Gross, in the presence of Cawthorn, that unless he, Gross, paid the charges that plaintiff claimed were due for inspections and making minor adjustments in the sound reproducing equipment in defendant's Juneau and Ketchikan theatres, that plaintiff would remove and take out that equipment; I did not make any threats to [663] Gross, in the presence of Cawthorn, that unless he, Gross, signed the two supplemental agreements of September 4, 1929, plaintiff would remove and take out the sound reproducing equipment in Gross' Juneau and Ketchikan theatres; I do not remember any particular conversation had on December 29, 1929, in my office, other than my explanation to Gross of the charges for merchandise which were in addition to the straight service charge; these items amounted to \$7.50 for the Coliseum Theatre, Juneau, and \$8.60 for the Coliseum Theatre, Ketchikan; Gross' operators in Alaska had signed orders for these additional amounts, merchandise items, and it was necessary for me to call Mr. Briggs, who explained to Gross in detail what the items were for and how they were used in connection with the equipment; no threats were made; I told Gross that if he wanted to use the equipment it would be necessary for him to pay the weekly service charges as

(Testimony of J. A. Gage.)

he had agreed to do; I heard no one make any threats at that time, that plaintiff intended to take out or remove the sound reproducing equipment from Gross' Juneau and Ketchikan theatres, unless Gross made said payment. [664]

H. M. WILCOX

H. M. Wilcox, plaintiff's witness, heretofore sworn, further testified:

Direct Examination.

My office has been at 250 West 57th Street, New York City, and I never had an office in Chicago; plaintiff has an office in Chicago but it has nothing to do with equipment or customers in Alaska and never did; I never told defendant or any of his employees I had an office in Chicago; I know Nathan P. Levinson, who was formerly general manager of plaintiff's Western Division with headquarters in Los Angeles, reporting to me; I know N. A. Robinson, who is and was operating manager of plaintiff's Western Division, reporting to Levinson, who in turn reported to me; among the duties of my position with plaintiff I have supervision of the correspondence conducted by plaintiff's New York Office with plaintiff's various licensees relating to servicing their equipment; that comes under my jurisdiction; plaintiff's New York Office keeps a true and accurate record of its correspondence and things of that kind regarding servicing of

(Testimony of H. M. Wilcox.)

equipments of their licensees and has at all times since my connection with them; this letter dated May 20, 1929, is a true copy of the original letter sent to the addressee as shown thereon.

Whereupon plaintiff's letter to defendant dated May 20, 1929, was received in evidence marked

PLAINTIFF'S EXHIBIT 50

and reads:

May 20, 1929

Alaska Film Corp.,
Coliseum Bldg.,
Juneau, Alaska

Attention: Mr. A. D. Gross

Gentlemen:

The installation of the Western Electric Sound Projector Equipment was completed in your Coliseum Theatre, Juneau, Alaska, on May 10, 1929.

We invite your attention to Paragraph 6 of the agreement which provides that the first two weekly payments shall be due and payable on the Saturday following the completion of the in- [665] stallation and thereafter weekly in advance.

As a matter of courtesy, maturity notices of amounts due each week will be forwarded to you, but failure to receive such weekly notices does not in any way relieve you of the obligation to make the weekly payments as provided.

Kindly arrange to issue the necessary instructions to forward checks to this office.

Yours very truly,

Assistant Credit Manager.

(Testimony of H. M. Wilcox.)

Whereupon Witness Wilcox further testified: H. N. Bessy signed that letter, which is a standard form of letter sent to all exhibitors as soon as plaintiff's Credit Department in New York receives notice that an installation is completed, in order to notify the exhibitor when the service day is; on April 29, 1931, about eighty or eighty-five per-cent of all installations of sound reproduction equipments that had been made up to that time were confined to about twenty or twenty-five different makes of equipments, but the balance did not represent any great amount of business; I would say that approximately fifty or seventy-five makes of equipment were available at that time; I know the general conditions as to the market in the spring of 1931 and as to the various makes of sound equipment on the market, but not as to the various terms under which they were being sold or as to the various times in which delivery could be had of them.

I never made any statement in the conversation at which defendant and some of his witnesses were present in Juneau in July, 1929, that the contracts with defendant contained no provision for payment by defendant of service charges.

Thereupon Witness Wilcox further testified: I was present in the Court Room when defendant testified that there was no correspondence between plaintiff and defendant relative to the contract's plaintiff's exhibits Nos. 1 and 3, prior to February 19, 1929, which statement was false; there was cor-

(Testimony of H. M. Wilcox.)

respondence between plaintiff and defendant prior to February 19, 1929, relative to [666] those contracts, plaintiff's exhibits Nos. 1 and 3.

Thereupon Witness Wilcox further testified: I now produce an original telegram received by plaintiff's New York office from defendant's Juneau Coliseum Theatre.

Whereupon defendant's telegram by Coliseum Theatre to plaintiff, through R. A. Quinn, dated November 17, 1929, was received in evidence, marked

PLAINTIFF'S EXHIBIT No. 54,

and reads:

NL Collect Juneau Alaska Nov 17 1929
R Q Quinn Electrical Research Products
New York NY

As we have wired before Mr. Gross in New York or on way to Seattle he has your letter contracts wires etc can not do anything on service charges until he okays them have your Seattle representative take this matter up with him when he arrives there around twenty fifth he stops at Atwood Hotel Seattle we have remitted for small items first of month.

Coliseum Theatre.

Thereupon Witness Wilcox further testified: The extent of my experience and knowledge in respect

(Testimony of H. M. Wilcox.)

to servicing theatres that are equipped with sound reproducing equipment is that over the past eight years I have been in more or less constant touch or communication with the leaders of the industry and with exhibitors generally; I have had conferences with such men as Sydney Lentz, [667] Warner Brothers, Richardsons of New Orleans, Willoughby of Atlanta, as well as hundreds of exhibitors, and my experience has been of national scope throughout the United States; I know what the word "service" means as understood by people engaged in the moving picture business and in the operation of sound reproducing equipment; different individuals have different opinions but in general the accepted definition of "service" is this:

"That periodic inspections and adjustments to equipments should be made by an experienced and trained organization and that spare and replacement parts should be available for reasonably quick service to the end that equipments may operate as nearly as possible with a minimum of interruptions, at least interruptions which would affect the box office receipts; that the quality of reproduction be maintained at an efficient standard, so that the public will continue to attend the theatres, and that the project as a whole will not be subject to the danger of financial failure as had every other attempt at talking motion pictures failed—previous attempts. I might say that the matter of

(Testimony of H. M. Wilcox.)

reserve was also included, the reserves at our main warehouse, designed to replenish the emergency stores located in different parts of the country, and also to provide quick replacements of equipments in the event of destruction by fire, tornado, earthquake or other acts of God, at our own expense, as specified in the contract.”

I would say that was the generally accepted definition by the industry of “service” during the time that plaintiff’s equipment was in defendant’s theatre in Juneau and Ketchikan. [668]

M. E. MONAGLE

M. E. Monagle, plaintiff’s witness, heretofore sworn, being recalled, further testified:

Direct Examination.

I returned to defendant’s Coliseum Theatre on April 20, 1931, probably fifteen minutes before the booth was actually opened by United States Marshal White; they were arguing around and Marshal White had threatened to take these people to jail for interfering with the Marshal’s official duty, and about that time, I think, Gross ordered Tuckett to give the Marshal the key and then Marshal White actually opened the booth; just about that time, when the booth was open the Marshal directed

(Testimony of H. M. Wilcox.)

Lawrence to go in and take out what part he was going to take out and Gross said "Take the damn things out anyway. They are no good. I have better machines here to put in," and he also said, "Take them out and throw them in the Bay." He said that to Lawrence and Marshal White; Tuckett, Deputy Marshals Newcomb and Martin, United States Marshal White, Lawrence, Duncan Sinclair, defendant, and myself were present at that time. [669]

R. H. PEARSALL

R. H. Pearsall, plaintiff's witness, heretofore sworn, being recalled, further testified:

Direct Examination.

I received these two telegrams, one from the Coliseum Theatre and one from Witness Tuckett.

Thereupon telegram from defendant by Coliseum Theatre to Pearsall on behalf of plaintiff, dated Wrangell, Alaska, June 13, 1930, and telegram from defendant by Witness Tuckett to Pearsall on behalf of plaintiff dated March 17, 1930, were received in evidence, respectively marked

PLAINTIFF'S EXHIBITS Nos. 57 and 58
and read, respectively:

57

Collect DL Wrangell Alaska June 13 1930

R. H. Pearsall

Electrical Research Prod Co

Los Angeles Calif

Mr Gross just arrived Juneau advise us what our account delinquent will forward check covering letter following.

Coliseum Theatre

58

DL Collect Juneau Alaska Mar 17 1930

R H Pearsall

Los Angeles Calif

Regarding service charges Mr Gross on way to Seattle to take this matter up with Gage will advise you from there

Chas Tuckett Manager Coliseum

Thereupon Witness Pearsall further testified: I was in Los Angeles at plaintiff's office during all the period between September 15, 1929, and February 10, 1930, and defendant never called on me during that time and I did not see him. [670]

D. KNOWLTON

D. Knowlton, plaintiff's witness, by deposition further testified:

Direct Examination.

During the time that I was making inspections of defendant's theatres, neither he nor anyone on his behalf made any complaint to me that the plaintiff was not complying with the provisions of the agreements between plaintiff and defendant relative to plaintiff's making inspections of and minor adjustments in the sound reproducing equipments in defendant's Juneau and Ketchikan theatres.

Cross Examination.

I sailed from Vancouver, B. C., on or about September 27, 1929, on the Princess Louise for Ketchikan arriving there on or about September 29, 1929, and sailed from Ketchikan for Juneau on the Yukon on October 1, 1929, arriving at Juneau on or about October 2, 1929, and I sailed from Juneau for Seattle, Washington, on the Admiral Rogers on October 4, 1929.

J. B. DARRAGH, JR.

J. B. Darragh, Jr., plaintiff's witness, by deposition further testified:

Direct Examination.

During the time that I was making inspections of defendant's theatres, neither he nor anyone on his behalf made any complaint to me that the plain-

(Testimony of J. B. Darragh, Jr.)

tiff was not complying with the provisions of the agreements between plaintiff and defendant relative to plaintiff's making inspections of and minor adjustments in the sound reproducing equipments in defendant's Juneau and Ketchikan theatres. [671]

E. S. TOBEY

E. S. Tobey, plaintiff's witness, by deposition further testified:

Direct Examination.

The only complaint that I am aware of, ever made during the time that I was making inspections of defendant's theatres, that either he or anyone on his behalf made to me that the plaintiff was not fully complying with the provisions of the agreements between plaintiff and defendant relative to plaintiff's making inspections of and minor adjustments in the sound reproducing equipments in defendant's Juneau and Ketchikan theatres, is contained in the note under "remarks" on plaintiff's exhibit No. 12-A.

R. C. LITTLE

R. C. Little, plaintiff's witness, by deposition further testified:

Direct Examination.

I do not remember that Gross or anyone on his behalf made any complaint to me, during the time

(Testimony of R. C. Little.)

that I was making inspections of defendant's theatres, that plaintiff was not fully complying with the provisions of the agreements between plaintiff and defendant relative to the plaintiff's making inspections of and minor adjustments in the sound reproducing equipments in defendant's Juneau and Ketchikan theatres.

F. FOULON

F. Foulon, plaintiff's witness, by deposition further testified:

Direct Examination.

During the time that I was making inspections of defendant's theatres the major complaint that defendant made to me that plaintiff was not fully complying with the provisions of the agreements between plaintiff and him relative to plaintiff's making inspections [672] of and minor adjustments in the sound reproducing equipments in his Juneau and Ketchikan theatres, was that he had no emergency service when the engineer was not in town, although he repeatedly affirmed that the routine inspections were acceptable in all respects; which complaint was made on May 16, 1930, report whereof is contained in plaintiff's exhibit No. 13-D; I reported the complaint to J. S. Briggs, Seattle, Washington, by letter dated May 21, 1930.

(Testimony of F. Foulon.)

Cross Examination.

Over a period of 5½ months I do not recall at this time the names of the steamers on which I arrived at Juneau or Ketchikan, Alaska, as of any particular date. During the time I was in Alaska my principal traveling was done on the steamers "Alaska", "Yukon" and "Aleutian."

H. C. HURLBURT

H. C. Hurlburt, plaintiff's witness, by deposition further testified:

Direct Examination.

During the time that I was making inspections of defendant's theatres, neither he nor anyone on his behalf made any complaint to me that the plaintiff was not complying with the provisions of the agreements between plaintiff and defendant relative to plaintiff's making inspections of and minor adjustments in the sound reproducing equipments in defendant's Juneau and Ketchikan theatres. [673]

G. E. MATHER

G. E. Mather, plaintiff's witness, being first duly sworn, testified:

Direct Examination.

I reside at 949 Maple Avenue, Ridgefield, New Jersey, and have no present association or business

(Testimony of G. E. Mather.)

relation with plaintiff other than as a witness, but I was connected with it from early in 1929 to early in 1933 as Director of Engineering; my experience in connection with the sound moving picture business is as follows:

“Early in 1926 I was employed in the Bell Telephone laboratories and at that time took charge of a group of engineers who were engaged in the study of the fundamental problems connected with the recording and the reproduction of sound and designing the necessary equipment which could be used for that purpose.

This group of engineers prepared—did the experimental work, prepared the designs for the various pieces of apparatus that were required for the recording and reproduction of sound; they wrote the specifications for all these different pieces and tested the products that were turned out from the Western Electric Factory in Hawthorne, and after it was so designed, tested and approved the engineers gave to the reproducing company information on how that equipment should operate and what particular precaution should be taken in the use of that equipment in the field. My experience with the Bell Telephone Laboratories continued until early in 1929 when I was transferred to the Electrical Research Products as Director of Engineering. In my experience in

(Testimony of G. E. Mather.)

the laboratories, my job was to direct and to coordinate the efforts of the various engineers that were engaged in the work. I was not supposed to contribute all the technical knowledge or experience that was required, because at that time the engineers engaged in the work were experts on various subjects, for instance, H. M. Stoller was in charge of the motor design. He is a nationally known figure. Other engineers were engaged on mechanical problems, others on electrical problems, such as amplifiers; in other words we had a group of about fifty experts who were engaged on all phases of the problems that arose in the designing of this new and special apparatus."

I entered the employ of the Western Electric Company in 1902, stayed there until 1913 when they gave me leave of absence to go to Puerto Rico where I was chief engineer of the Puerto Rico Telephone Company from 1913 to 1915 and then returned to the employ of the Western Electric in 1916 and was there continuously with the Western Electric and Bell Telephone Laboratories until 1929 and was in charge of the designing of the synchronous sound picture apparatus [674] that finally became successful as the actual operating feature in moving picture shows; I am thoroughly familiar with the functioning of such equipments as were situated in defendant's Juneau and Ketchikan Theatres; I am familiar with this diagram which shows

(Testimony of G. E. Mather.)

the voltage battery connections to the amplifier in the sound picture booth on sound picture equipment, such as No. 1 and No. 2 amplifier equipment, similar to what was used in defendant's Coliseum Theatres.

Thereupon the diagram was received in evidence marked

PLAINTIFF'S EXHIBIT No. 56,

the original of which exhibit is made a part hereof as *they* cannot be reproduced in print or type-writing.

Thereupon Witness Mather further testified:

"This is a simplified circuit diagram, showing the 12-volt storage battery connections to the film and disc signal lamps to the photo cell amplifier to the exciter lamp of machine number one, to the corresponding elements of machine number 2, to the 41-A amplifier, which is shown on that rack over there, and to the field coils of the horns on the stage. There are four fuses, each one of which is intended to protect one element of this outfit, that is, the first is inserted in the circuit which goes to machine number 2, the second fuse is in the circuit which goes to machine number two, the third fuse is inserted in the circuit that goes to the 42-A amplifier, and the fourth fuse is inserted in the circuit that goes to the field of the horns on the stage. This diagram shows the signal lamp on machine number one cross or short-

(Testimony of G. E. Mather.)

circuited; it shows the disc film switch from the disc and it shows the fuse inserted in the 12-volt battery circuit going to machine number one is blown."

In the event that fuse for Machine No. 1 is blown as indicated, Machine No. 1 can be used for reproducing sound from the disc.

"Because the reproduction of sound from the disc has no connection with the battery circuit; the 12-volt battery circuit that goes to the signal lamp, the sound circuit or disc goes direct from the reproducer through the disc through the fader and to the 42-A amplifier without being connected in any way to the 12-volt storage battery circuit."

The blowing of that No. 1 fuse in the 12 volt storage battery does not affect reproduction from the disc here on Machine No. 1 or No. 2 or the reproduction of sound from film No. 2 because No. 2 fuse which provides the battery current to Machine No. 2 is still going and it does not interfere at all with the operation of No. 41-A amplifier because the fuse to that amplifier is entirely separate [675] from the fuses to the Machines Nos. 1 and 2; the short-circuiting of the disc signal lamp on Machine No. 1, so far as that diagram is concerned, would have no effect on the reproduction of sound from the disc on either No. 1 or No. 2 machines; if the trouble described in the testimony of defendant's witnesses

(Testimony of G. E. Mather.)

Tuckett, Louis Lemieux, and Ned Lemieux is correctly indicated on that diagram, it would not be possible to reproduce sound from film on Machine No. 1; it is important in storage battery maintenance to keep the contacts clean and tight at all points in all batteries on that kind of equipment, as well as all the other switch contacts because otherwise electrolic action and corrosion is set up, high resistance developed and noise is introduced into the amplifier system. It is necessary to keep the B battery clean, because if dust forms or collects on top of those B batteries it provides a leakage path which is very likely to introduce noise into the system since the power which is developed in the early parts of the circuit is so infinitesimally small compared with the sound reproduced in the theatre from the loud speaker; in other words if a very small element of trouble is introduced in the early part of the circuit that trouble is magnified millions or possibly billions of times before it reaches the loud speaker; also contacts must be clean, because any dirt or variation in the resistance which occurs while the apparatus is in operation is magnified thousands or millions of times before that disturbance reaches the loud speaker, out of which comes the sound that is heard in the theatre.

R. E. ROBERTSON

R. E. Robertson, plaintiff's witness, being first duly sworn testified:

Direct Examination.

I have resided in Juneau twenty-eight and a half years; my profession is Attorney-at-Law in which I have been actively engaged since 1913, having been admitted in 1911; I am and, ever since the commencement of this action, have been plaintiff's counsel; at the time that I took defendant's deposition on March 16, 1932, I asked him, among other things, to produce a statement showing his alleged profits; his counsel, Mr. Faulkner and Judge Si Hellenthal, were present at that time; subsequently on August 15, 1932, Judge Hellenthal brought to my office and served upon me in answer to the demand that I had made on defendant, these two papers that I now produce, one of which purports to be a comparative operating statement of defendant's Ketchikan Theatre for the period of time shown therein, together with a recapitulation on the outside, and the other is a similar statement for defendant's Juneau Coliseum Theatre, with a recapitulation thereon, which recapitulations were not prepared by me but were attached to the statements when I received them; the statements purport to show the receipts and expenses of those respective theatres.

Whereupon said statements were received in evidence, marked

(Testimony of R. E. Robertson.)

PLAINTIFF'S EXHIBITS 55 and 55-A
respectively, and read:

RECAPITULATION

Juneau Alaska Theater

Total Receipts 12 Mo. 4/1/30 to 3/31/31.....	\$51,218.37
Total Expenses 12 Mo. 4/1/30 to 3/31/31.....	33,914.14
	<hr/>
Profit Excluding Film Cost.....	\$17,304.23
Less Film Cost	10,800.00
	<hr/>
Net Operating Profit	6,504.23
Total Receipts 12 Mo. 4/1/31 to 3/31/32	33,390.93
Total Expenses 12 Mo. 4/1/31 to 3/31/32.....	26,511.06
	<hr/>
Profit Excluding Film Cost	\$ 6,878.87
Less Film Cost	10,800.00
	<hr/>
Net Loss from Operations	\$ 3,921.13
Operating Profit 12 Months 4/1/30 to 3/31/31.....	\$ 6,504.23
Loss from Operations 12 Mo. 4/1/31 to 3/31/32.....	3,921.13
	<hr/>
Loss 12 Mo. 4/1/31 to 3/31/32 over	
4/1/30 to 3/31/32.....	\$10,425.36
Film Cost based on budget of \$900.00 per month for Juneau Theatre.	

[676]

COMPARATIVE OPERATING STATEMENT

Juneau — Excluding Film Costs

	Receipts July, 1929	Receipts to Mar., 1931 incl.	12.mo. period	Receipts Apr., 1931 to Mar. 31, 1932	Loss in Receipts	Operating Expenses July, 1929 to Mar., 1931 as per sheet 1	12 mo. period	Operating Expenses Apr., 1931 to Mar. 31, 1932 as per sheet 2
July, 1929	\$ 6,308.40					\$2,511.25		
Aug., 1929	5,547.15					2,168.55		
Sept., 1929	5,393.35					2,489.98		
Oct., 1929	5,501.71					4,099.59		
Nov., 1929	6,068.02					2,208.73		
Dec., 1929	4,985.99					3,121.28		
Jan., 1930	4,633.35					2,344.06		
Feb., 1930	3,757.91					2,575.94		
Mar., 1930	3,674.55					3,566.18		
Apr., 1930	4,991.35		4,991.35	2,592.29	2,389.06	3,825.18	2,835.18	2,376.90
May, 1930	4,324.10		4,324.10	3,301.26	1,022.84	2,923.46	2,923.46	2,824.63
June, 1930	4,219.28		4,219.28	3,003.13	1,216.15	4,908.41	4,908.41	1,895.68
July, 1930	4,295.50		4,295.50	2,860.25	1,435.25	2,676.83	2,676.83	1,971.70
Aug., 1930	4,458.06		4,458.06	3,165.95	1,292.11	2,150.11	2,150.11	1,825.21
Sept., 1930	5,156.80		5,156.80	2,845.50	2,311.30	2,092.28	2,092.28	2,208.78
Oct., 1930	4,861.79		4,861.79	3,518.09	1,343.70	2,885.16	2,885.16	2,384.46
Nov., 1930	3,907.90		3,907.90	2,524.50	1,383.40	2,851.58	2,851.58	1,785.60
Dec., 1930	5,517.55		5,517.55	2,790.44	2,727.11	2,577.64	2,577.64	2,887.10
Jan., 1931	3,347.41		3,347.41	2,257.17	1,090.24	1,749.46	1,749.46	1,841.51

(Testimony of R. E. Robertson.)

(Testimony of R. E. Robertson.)

	Receipts July, 1929 to Mar., 1931 incl.	12 mo. Period	Receipts Apr., 1931 to Mar. 31, 1932	Loss in Receipts	Expenses July, 1929 to Mar., 1931 as per sheet 1	12 mo. period	Expenses Apr., 1931 to Mar. 31, 1932 as per sheet 2
Feb., 1931	3,078.68	3,078.68	2,456.80	621.88	2,379.10	2,379.10	2,193.13
Mar., 1931	3,059.95	3,059.95	2,075.55	984.40	2,884.93	2,884.93	2,316.36
	97,088.80	51,218.37	33,390.93	17,817.44	58,999.70	33,914.14	26,511.06
Total Receipts 12 months Apr. 1, 1930 — Mar. 31, 1931						\$51,218.37	
Total Expenses 12 months Apr. 1, 1930 — Mar. 31, 1931						33914.14	
Profit Excluding Film Costs						17,304.23	
Less Film Costs						10800.00	
Net Operating Profit						6504.23	
Total Receipts 12 months Apr. 1, 1931 — Mar. 31, 1932						33390.93	
Total Expenses 12 months Apr. 1, 1931 — Mar. 31, 1932						26511.06	
Profit Excluding Film Costs						6878.87	
Less Film Costs						10800.00	
Net Operating Loss						3921.13	
Net Operating Profit 12 months Apr. 1, 1930 — Mar. 31, 1931						6504.23	
Net Operating Loss 12 months Apr. 1, 1931 — Mar. 31, 1932						3921.13	
Net Loss 12 months 4/1/31 - 3/31/32 over 4/1/30 - 3/31/31						10,425.36	

[677]

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953

Jun The	Interest	Trav.	Taxes			
July,	258.85	35.00		2511.25		
Aug.,	126.10	25.00		2168.55		
Sept.,	257.80	190.00		2489.98		
Oct.,	278.70	742.86	683.10	4099.59		
Nov.,	283.84	288.51		2208.73		
Dec.,	606.45	366.70		3121.28		
Jan.,	274.85	160.00		2344.06		
Feb.,	284.35	170.20	7.90	2565.94		
Mar.,	146.05	80.40	683.10	3566.18		
Apr.,	495.65	273.15	51.15	3835.18		
May,	329.75	126.20		2923.46		
June,	327.95	218.25	10.00	4908.41		
July,	320.35	10.00		2676.83		
Aug.,	333.43			2150.11		
Sept.,	327.60			2092.28		
Oct.,	317.60	132.75	739.10	2885.16		
Nov.,	308.05	464.10		2851.58		
Dec.,	292.50			2577.64		
Jan.,	510.27	25.00		1749.46		
Feb.,	200.00			2379.10		
Mar.,	581.60		728.10	2884.93		

[678]

Nov., 1930	3,741.25	932.47	1,273.47
Dec., 1930	2,813.15	1,326.58	864.35
Jan., 1931	3,290.35	1,341.56	626.65

Juneau Theatre	Receipts	Fr.	Fire Ins.	Wages	Adv.	Oil	Room & Light	Films	Repairs	Misc. Exp.	Interest	Trav.	Taxes
July, 1929	6308.40			781.65	77.40	69.77	116.26	13.77	632.07	540.25	258.85	35.00	2511.25
Aug., 1929	5547.15	157.34	151.00	1028.21	126.20	71.37	161.94		207.83	113.56	126.10	25.00	2168.55
Sept., 1929	5393.35	56.75		1046.83	71.55	69.87	151.10		353.33	110.75	257.80	190.00	2489.98
Oct., 1929	5501.71	158.00	253.90	927.90	85.40	124.74	242.25	1800.00	448.31	154.43	278.70	742.86	683.10 4099.59
Nov., 1929	6068.02	76.10	126.00	942.45	96.90	89.68	118.65	2000.00	75.06	161.54	283.84	288.51	2208.73
Dec., 1929	4985.99	109.66		1040.40	102.25	129.10	156.97	1221.92	513.45	96.30	606.45	366.70	3121.28
Jan., 1930	4633.35	180.44		1030.38	131.16	201.78	214.49	1850.00	86.21	64.75	274.85	160.00	2344.06
Feb., 1930	3757.91	96.20		980.00	115.35	266.53	161.53	141.15	231.67	262.04	284.35	170.20	7.90 2565.94
Mar., 1930	3674.55	236.56		1595.92	93.45	165.02	155.30	700.00	216.47	193.91	146.05	80.40	683.10 3566.18
Apr., 1930	4991.35	125.32		1403.90	118.95	247.88	379.20	2120.66	568.81	171.15	495.65	273.15	51.15 3835.18
May, 1930	4324.10			1727.34	125.00		382.15	200.00	204.05	28.97	329.75	126.20	2923.46
June, 1930	4219.28	43.21	500.00	1235.40	311.05	233.10	410.40	1050.00	788.05	831.00	327.95	218.25	10.00 4908.41
July, 1930	4295.50	262.02		634.96	175.35	104.31	160.00	1840.49	822.99	186.85	320.35	10.00	2676.83
Aug., 1930	4458.06	209.54	243.75	648.96	140.60	82.26	122.93	900.00	295.89	72.75	333.43		2150.11
Sept., 1930	5156.80	5.00		1275.69	115.95	76.80	105.90	1450.00	24.47	160.87	327.60		2092.28
Oct., 1930	4861.79	17.54		965.00	75.60	151.65	142.20	400.00	71.69	272.03	317.60	132.75	739.10 2885.16
Nov., 1930	3907.90	65.84		1022.50	52.05	155.07	316.49	500.00	352.93	114.55	308.05	464.10	2851.58
Dec., 1930	5517.55	41.87	135.90	1087.50	81.20	183.57	160.99	1124.50	398.65	195.46	292.50		2577.64
Jan., 1931	3347.41	26.85	42.00	647.00	103.95	213.29		1965.00		181.10	510.27	25.00	1749.46
Feb., 1931	3078.68	150.40		950.60	420.88	194.85	227.45	2463.95	140.22	94.70	200.00		2379.10
Mar., 1931	3059.95	48.65		979.00	172.23	170.91	180.94	1792.75		23.50	581.60		728.10 2884.93

(Testimony of R. E. Robertson.)

954

55

RECEIPTS & EXPENSES — JUNEAU & KETCHIKAN

Juneau Theatre	Apr. 1931 to 1932 Excluding Film Costs										
	Receipts	Repairs	Fr.	Fire Ins.	Wages	Adv.	Oil	Light	Gen. Exp.	Int.	Taxes
Apr., 1931	2592.29		403.94		957.00	172.23	170.91	188.65	193.42	290.75	
May, 1931	3301.26	289.86	63.13	175.00	719.50	179.20	227.58	209.47	323.64	637.25	
June, 1931	3003.13	224.21			545.00	166.95	153.72	205.25	200.75	399.80	
July, 1931	2860.25	234.38	180.66		531.20	344.00	201.60	135.46	13.50	330.90	
Aug., 1931	3165.95	140.01	95.64	185.75	565.00	209.30	160.80	121.75	127.66	363.90	
Sept., 1931	2845.50	202.87	119.64	230.00	565.00	149.90	75.60	158.93	221.74	340.50	
Oct., 1931	3518.09	232.34	19.80		496.70	128.90	100.80	135.12	200.95	345.85	724.00
Nov., 1931	2524.50	309.15	60.00		465.00	143.60	165.45	137.85	129.15	375.40	
Dec., 1931	2790.44	834.00	39.95	207.40	648.00	95.90	215.60	135.10	243.15	395.00	73.00
Jan., 1932	2257.17	149.07			526.50	84.70	224.60	207.20	250.04	399.40	
Feb., 1932	2456.80	107.98	123.50		630.00	126.50	276.10	209.85	319.70	399.50	
Mar., 1932	2075.55		50.27	27.70	500.00	105.75	242.04	189.60		407.00	794.00

[679]

COMPARATIVE OPERATING STATEMENT

Ketchikan — Excluding Film Cost

	Receipts July 1929 to Mar. 31, 1931 incl.	12 Mo. Period	Receipts Apr. 1931 to Mar. 31, 1932	Loss in Receipts	Operating Expenses July, 1929 to Mar. 31, 1931 As per # 1	12 Mo. Period	Operating Expenses Apr. 1931 to Mar. 31, 1932 As per # 1
July, 1929	7,519.70				1,630.81		
Aug., 1929	6,234.07				1,438.19		
Sept., 1929	6,682.75				847.69		
Oct., 1929	7,109.70				940.71		
Nov., 1929	5,705.85				946.25		
Dec., 1929	4,314.20				1,148.63		
Jan., 1930	4,462.30				1,358.27		
Feb., 1930	3,942.70				908.39		
Mar., 1930	4,310.35				868.80		
Apr., 1930	4,727.70	4,727.70	2,987.15	1,740.55	1,917.20	1,917.20	683.97
May, 1930	4,848.35	4,848.35	2,961.27	1,887.08	923.31	923.31	1,094.37
June, 1930	4,504.05	4,504.05	2,877.05	1,627.00	1,343.69	1,343.69	692.52
July, 1930	4,821.25	4,821.25	2,957.80	1,862.45	1,233.49	1,233.49	780.57
Aug., 1930	4,365.35	4,365.35	2,853.20	1,512.15	892.17	892.17	990.13
Sept., 1930	5,625.75	5,625.75	2,990.18	2,635.57	1,038.20	1,038.20	532.98
Oct., 1930	4,613.00	4,613.00	2,607.40	2,005.60	966.90	966.90	796.80
Nov., 1930	3,741.25	3,741.25	2,302.00	1,439.25	932.47	932.47	1,273.47
Dec., 1930	2,813.15	2,813.15	1,437.35	1,375.80	1,326.58	1,326.58	864.35
Jan., 1931	3,290.35	3,290.35	977.84	2,312.51	1,341.56	1,341.56	626.65

(Testimony of R. E. Robertson.)

(Testimony of R. E. Robertson.)

	Receipts July 1929 to Mar. 31, 1931 incl.	12 Mo. Period	Receipts Apr. 1931 to Mar. 31, 1932	Loss in Receipts	Operating Expenses July, 1929 to Mar. 31, 1931 As per # 1	12 Mo. Period	Operating Expenses Apr. 1931 to Mar. 31, 1932 As per # 1
Feb., 1931	3,059.05	3,059.05	1,444.24	1,614.81	741.07	741.07	704.12
Mar., 1931	3,422.00	3,422.00	1,383.85	2,038.15	839.81	839.81	643.80
	100,212.87	49,831.25	27,779.33		23,584.19	13,496.45	9,683.73
Total Receipts 12 months Apr. 1, 1930 to Mar. 31, 1931						49,831.25	
Total Exp. 12 months Apr. 1, 1930 to Mar. 31, 1931						13,496.45	
Profit Excluding Film Cost						36,334.80	
Less Film Cost						10,800.00	
Net Operating profit						25,534.80	
Total Receipts 12 months Apr. 1, 1931 to Mar. 31, 1932						27,779.33	
Total Exp. 12 months Apr. 1, 1931 to Mar. 31, 1932						9,683.73	
Profit Excluding Film Cost						18,095.60	
Less Film Cost						10,800.00	
Net Operating						7,295.60	
Net Profit 12 mo. Apr. 1, 1930 — Mar. 31, 1931						25,534.80	
Net Profit 12 mo. Apr. 1, 1931 — Mar. 31, 1932						7,295.60	
Net Loss 12 mo. 4/1/31 - 3/31/32 over 4/1/30 - 3/31/31						18,239.20	

(Testimony of R. E. Robertson.)

55-A

957

Ketchikan	Receipts	Repairs	Fr.	Fire Ins.	Wages	Adv.	Oil	Lights	Gen. Exp.	Int.	Taxes
Apr., 1931	2987.15		87.74		557.50	100.55		78.95		39.23	
May, 1931	2961.27			403.90	465.00	98.65		90.15		36.67	
June, 1931	2877.05		16.56		360.00	125.65	54.42	91.45		44.44	
July, 1931	2957.80		25.68		390.00	123.94	123.35	88.60		29.00	
Aug., 1931	2853.20		25.45		350.00	119.20		87.20		25.78	382.50
Sept., 1931	2990.18		23.78		270.00	107.80	43.25	73.40		14.75	
Oct., 1931	2607.40	197.35	19.25		370.00	112.85		79.35		18.00	
Nov., 1931	2302.00	668.37	10.75		370.00	127.90		80.90		15.55	
Dec., 1931	1437.35				370.00	130.00	265.73	83.95		14.67	
Jan., 1932	977.84		8.73		255.00	111.75		94.40	156.77		
Feb., 1932	1444.24		37.00		345.00	80.00		74.20	145.25	22.67	
Mar., 1932	1383.85		24.38		270.00	94.50	102.00	95.40		57.52	

[681]

(Testimony of R. E. Robertson.)

55-A

RECAPITULATION

Ketchikan Theatre

Total Receipts 12 months 4/1/30 to 3/31/31.....	\$ 49,831.25
Total Expenses 12 months 4/1/30 to 3/31/31.....	13,496.45

Profit Excluding Film Costs	\$ 36,334.80
Less Film Costs	10,800.00

Net Operating Profit for period	\$ 25,534.80
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Total Receipts 12 months 4/1/31 to 3/31/32.....	\$ 27,779.33
Total Expense 12 months 4/1/31 to 3/31/32.....	9,683.73

Profit Excluding Film Costs	\$ 18,095.60
Less Film Costs	10,800.00

Net Operating Profit for period	\$ 7,295.60
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Net Profit 12 Mo. 4/1/30 to 3/31/31 as above.....	\$ 25,534.80
Net Profit 12 Mo. 4/1/31 to 3/31/32 as above.....	7,295.60

Net Loss 12 Mo. 4/1/31 to 3/31/32 over 4/1/30 to 4/31/31	\$ 18,239.20
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Note: Film Costs based on budget of \$900.00 per month for Ketchikan Theater.

Thereupon Witness Robertson further testified: I had a telephone conversation with defendant on March 31, 1931, and remember substantially what was said in that conversation; he telephoned me along about half-past five in the afternoon on that day and told me he had received my letter dated March 26, 1931. defendant's exhibit F-10; he said he was very much exercised about this demand, because Witness Tuckett had concealed it from him

(Testimony of R. E. Robertson.)

and he didn't know anything about it and wanted to have further time; I told him in effect that I couldn't give him any further time, that I had been taking this matter up with him or Tuckett for several months and that my patience was about exhausted; he then told me that he had expected Captain Lathrop to arrive in Juneau, I think it was the Steamer Yukon, on either the same day or the day before he telephoned, and that he had a deal on with Lathrop under which the latter was negotiating to buy out his entire string of Alaskan Theatres for \$190,000.00, but he had been advised that Lathrop had the flu and was detained and couldn't come up, and was in the New Washington Hotel, in Seattle; he asked for further time and said if I would give him further time he would take the boat leaving, I believe, that night or the very next day, and go to Seattle to see [682] Lathrop and he promised me either he or Lathrop would wire me the money the next Monday; so I then told him under those circumstances I would give him until April 6, 1931, in which to clear up the account; I did not hear by wire or anything from him the next Monday; neither in that conversation nor any other time did defendant tell me that he didn't owe this money to plaintiff.

I also had a conversation with Witness Tuckett about this time; not having heard from Gross with the money on April 6, having heard from neither him nor Lathrop, on April 7 I saw Tuckett and

(Testimony of R. E. Robertson.)

I told him that he would have to have the money by April 10 or I would bring the suit; I don't recall specifically what Tuckett said in that conversation; I was trying to impress upon him that April 10 was the final date, if it wasn't paid by that time, I would bring suit; Tuckett never told me at any time that defendant did not owe the money to plaintiff in this case, on the contrary Tuckett on numerous occasions promised to pay the account, on some occasions he told me he would pay it, on other occasions he said he had sent money to pay them.

I didn't go to the Coliseum Theatre on the afternoon that the equipment was replevined from it until Marshal White telephoned to me; I was attending the Legislature that afternoon and when I got back to my office they told me they wanted me at the Coliseum theatre; I went over there after half past four in the afternoon; I don't know when any of the parties arrived as they were there when I got there, except Witness Monagle who was not there at that particular time; Mr. Simon Hellenthal was there, Tuckett, Marshal White was there or else came in when I was there, and two of the deputy marshals were there; they seemed to be having more or less of a row or quarrel about it, Marshal White asked me about it and I told him as far as I knew the writ was a valid writ, they hadn't questioned it, that we had the bonds put up in it, and as far as I knew it was all right to serve the writ; I did not threaten to or advise anybody to break

(Testimony of R. E. Robertson.)

down the door; I did not call Tuckett [683] or Gross or any of them any names.

Cross Examination.

Thereupon Witness Robertson further testified: When I said Mr. Hellenthal was there, I meant Simon not Jack Hellenthal.

NATHAN LEVINSON

Nathan Levinson, plaintiff's witness, upon deposition duly taken August 18, 1932, testified:

Direct Examination.

I reside in Hollywood, California; I held an official position with the plaintiff during the summer of 1927 to October, 1929; defendant Gross never called upon me nor did I see him during the period from September 1, 1929 to February 10, 1930.

HARRY B. GILMORE.

Harry B. Gilmore, plaintiff's witness, by deposition duly taken August 18, 1932, testified:

Direct Examination.

Defendant did not call upon me during the period from September 1, 1929 to February 10, 1930, nor during that period, to my knowledge, did he call at plaintiff's New York office.

(Testimony of R. E. Lawrence.)

Thereupon defendant's counsel, in open court, stated that defendant did not call upon plaintiff or any of its officials either in New York City or Los Angeles during the period between September 1, 1929 and February 10, 1930. [684]

R. E. LAWRENCE

R. E. Lawrence, plaintiff's witness heretofore duly sworn, being recalled, further testified:

Direct Examination.

I was present on April 20, 1931, when plaintiff's equipment was replevined from defendant's Juneau theatre; I went to the Court House about two o'clock with Witness Monagle where he secured the writ of replevin and then Monagle, Deputy Marshals Martin and Newcomb and I went to the Coliseum Theatre; Attorney Robertson did not go with us; upon arriving at the theatre they attempted to serve the writ on Witness Tuckett, who in turn called defendant; the booth was locked and we couldn't get in; either defendant or Tuckett said he didn't know where the key to the booth was; there was quite a bit of discussion over quite a length of time and finally Witness Monagle went after Marshal White and when he came down there was considerable bickering and finally somebody called up Attorney Robertson; I went there to follow the orders of the Marshal who took me along

(Testimony of R. E. Lawrence.)

in order to effect the disconnection, as I was a technical man and knew how to do it; defendant's attorney, Si Hellenthal, came there; plaintiff's attorney Robertson did not call either Tuckett or Gross any names and remained there only about five minutes; there was some more arguing and finally Marshal White threatened to arrest Gross for interfering with an officer in performing his duty and eventually they produced the key; defendant was a little bit upset and he made a remark to take the plaintiff's equipment and throw it in the bay and I said, "That is O. K. with me." The booth was opened and I went in under the marshal's direction to take out the photoelectric cell, the 40-A pickup, that is the disc pickup, and disconnect the amplifier and horn panel; while I was packing up those necessary parts which would effectually disconnect the equipment, Tuckett came and started to disconnect No. 1 machine; I told them if they desired to have it removed, I preferred to do it myself; there was an awful lot of conversation and it left a rather confused picture in my [685] mind but Deputy Marshal Newcomb was the one who threatened to get a crowbar to break down the door of the booth; he did that before Attorney Robertson came.

I was also present in a way when the equipment was removed from the Ketchikan Theatre; I arrived there after our Universal Bases had been removed and the Wonderphone equipment had been installed; the Universal Bases were sitting in the

(Testimony of R. E. Lawrence.)

foyer outside of the booth, the charging equipment was still up in the battery room, and the amplifier, which is plaintiff's exhibit No. 16, had been removed from its former location, although I believe it was still in the booth, but it was not in operating condition at that time; they had Wonderphone operating when I got there; I remained in Juneau after April 20, 1931, leaving here April 27, 1931, and arriving in Ketchikan at ten o'clock a. m. April 28, 1931, remaining there until May 8, 1931.

On every call that I made to defendant's Juneau and Ketchikan Theatres there was something to be done, on numerous occasions grease was added to the drives, which was necessary; if grease was to be added to the drives I would not think that grease had been added the day before. The various acts and things, shown to have been done to the machines on my routine service reports, would not have been necessary had those machines been properly serviced a day or so or a week before the respective things that I performed to them; I base my answer on the fact that tubes don't disintegrate over night and exciter lamps don't—that is, they don't disintegrate so they get black in the outside and inside; and battery connection don't become loose over night and grease doesn't leak out over night.

Thereupon Witness Lawrence further testified: During the time that I performed service work in Seattle I serviced the Mission theatre which is the same theatre Witness Cawthorn testified about; I

(Testimony of R. E. Lawrence.)

serviced it from January, 1930, until the middle of April, [686] 1930, every two weeks; I know what service was given the Mission Theatre during the time Witness Cawthorn was there; that service was rendered to that theatre every two weeks, during the time I serviced it and during the time Al Johnson serviced it; I relieved Johnson in June, 1932, when he was on his vacation and serviced it for two weeks, the service was every two weeks; I don't know how long Johnson serviced it. I personally know what was Johnson's routine or schedule, taking it myself during his absence, and his schedule was a call every two weeks on some houses, every week on some of them; but it was not possible for him to have serviced the Mission Theatre every week because he was out of town every other week; he had three theatres in Bellingham, one at Sedro-Woolley, three at Everett, two at Bremerton, one at Mt. Vernon, and one at Anacortes, and during that time he was out of town I don't believe he could have serviced that equipment; I personally know he had those houses to serve; I know that Johnson was a competent service engineer.

I am familiar with the 12 volt storage battery installation, battery switch, and fusing arrangement of the switches that carry the storage battery current to the sound machines in the various parts such as were in defendant's Ketchikan and Juneau theatres, as well as the main 41-A amplifiers and the horns backstage of those theatres, I am acquainted

(Testimony of R. E. Lawrence.)

with plaintiff's exhibit No. 56, which indicates by a very simplified sketch, the 12 volt supply circuits from the battery to each machine and the horns backstage; it is one of our sound circuits; all the circuits have been drawn in a simplified form in order to make the sketch understood; that arrangement of fuses and batteries shown in that diagram is not unique to the installations in the Juneau and Ketchikan Coliseum Theatres but is a standard hook up used in all our equipments of that size wherever they are installed and this system was applicable [687] at the time those equipments were installed. Nothing has been eliminated from that diagram that could have been involved or had any defects in the trouble to which Witnesses Tuckett and Lemieux have testified; they are all shown there; in red ink are what we call speech circuits, or any circuits which result in sound in the auditorium, and show the path from either the photo cell or disc pick-up on to the fader; from the photoelectric cell, for instance, the output is led down here in to the film disc transfer switch that served the purpose of transferring the energy out on through the fader, which is your volume control; from there it is carried into the 41-A amplifier and down to the 42-A amplifier and from that to the horns located backstage; that diagram was prepared under my supervision; this diagram indicates the blown fuse as open and the other fuses

(Testimony of R. E. Lawrence.)

are indicated as being intact; under the conditions as shown there film and disc reproduction would both be realized from Machine No. 2 but from No. 1 you would have disc reproduction but nothing from the film side, the 12 volt supply from the 12 volt battery would be open.

Witness Tuckett's testimony when he said when this trouble happened, "I couldn't use my disc, it blew out the fuse in the battery room," was wrong because the disc requires no 12 volt supply; the equipment from the disc pickup is carried on straight through this red line through into the fader and back into the horns and requires no extraneous voltage supply; there is no way in which a short circuit in either machine would cripple both machines because the equipment is so designed that each one of these circuits from the power supply is separately fused and was designed in that manner to overcome that particular kind of trouble there is no main battery fuse and we don't want any because in the event of that fuse blowing from any cause it would cripple the whole system; under this system each one is separately fused and in case of this trouble would have no effect on this machine or on the main amplifier or the backstage horn field circuit. [688] Witness Tuckett could have used the disc at a time that he said he couldn't use it, because as I pointed out here, the red line from the disc pick-up on No. 1 machine is carried straight through the switch and down through the fader and ampli-

(Testimony of R. E. Lawrence.)

fiers to the horn. When Witness Tuckett in response to plaintiff's question "I understand you couldn't get any sound on account of that particular trouble," answered "Yes, she would blow the fuse," he was wrong because he said he blew a 12 volt supply fuse to that machine and it requires no 12 volt supply fuse to that machine and it requires no 12 volt supply. When Ned Lemieux in his testimony, in response to defendant's question in effect, "If it had not been for that good fortune we would have been shut down", answered "Yes", he was incorrect because you could always get sound from the disc on either machine, but you couldn't use film on that machine because as long as the fuse is open it carries the supply to the lamp and also the amplifiers; but you could use both film and disc on the other machine. The pilot light has no effect on reproduction from the disc; the photo-electric cell amplifier on Machine No. 1 would go out of business when the pilot light was short-circuited because it received the supply through the fuse which blew out and that would render the film operation on that machine No. 1 inoperative, but it would not put out No. 2. I say that Witness Lemieux was wrong in his testimony when being asked whether or not the trouble he testified to would stop the operation in the disc, he said "Yes, it would stop the operation of the entire equipment." He was also wrong when, in response to being asked, in both machines, he said: "Absolutely stops your main amplifier." He

(Testimony of R. E. Lawrence.)

was wrong because the main amplifier is separately fused; you have here the next to the bottom fuse on this panel giving a 12 volt supply to the 41 amplifier, which is the preliminary amplifier on this rack; it is separately fused, therefore blowing the fuse could not possibly effect the supply to the 41-A amplifier, and Lemieux when he stated substantially, in regard to the 41-A amplifier, "Yes it put that out of commission" was incorrect, because as I explained [689] this fuse which blew out in case of that trouble had no direct bearing and was not in circuit with the 41 amplifier; he was incorrect when he said the lamp socket was not fused on the 41 amplifier but on a different one, because this volt supply feeds not only the exciter lamp here on No. 1 machine on the 12 volt supply amplifier, but also the 12 volt supply to the lamp which caused the trouble. This one marked "X" is the one which actually caused the trouble. Following the diagram, plaintiff's exhibit No. 56, you see it receives its supply through the switch and, with that short in here, it blows the fuse over here, which in turn supplies the current to the film amplifier and exciter lamp of that machine; that is the factory wiring, the way they are wired at the factory when the machines come out.

Whereupon the following proceedings were had:

Q. Mr. Lawrence, I think you have already stated you have had considerable experience in

(Testimony of R. E. Lawrence.)

regard to servicing of sound equipment in moving picture theatres?

A. Yes sir.

Q. And had more or less of an extensive knowledge of people engaged in the moving picture business, both exhibitors and the people who put out the machines themselves, is that correct?

A. Yes sir.

Q. Mr. Lawrence, what do you say is the meaning of or definition ascribed to the word "service" by the moving picture industry and people that are engaged in it, either as exhibitors or operators of machines, etc., in respect——

(Question read)

Q. (adding)—To sound reproducing equipment?

A. I have discussed that with quite a number of exhibitors and the bulk of them feel that the service is taken from the angle that it is not an absolute preventative of sound shut down, but well worth the money they spend because of the fact that it eliminates a great deal of that possibility, and for that reason the anticipation of troubles which may occur at some future date, is well worth the money they spend for it.

Mr. HELLENTHAL: I move to strike the answer as not responsive. He didn't define "service" or state the meaning.

(Testimony of R. E. Lawrence.)

The COURT: I think the latter part should be stricken.

Q. In order to explain by whom or from whom anything like that state what your understanding is by that word among moving picture industry and people engaged therein, exhibitors, operators, etc., with reference to sound reproducing equipment, its inspection and adjustment of the system. [690]

A. In order to prevent future breakdowns as much as possible.

Q. Now, Mr. Lawrence, you gave a definition of the word "service" as you understood it to mean. Would you say from your contact and knowledge of the moving picture business and the people engaged therein, that that is the generally accepted definition of that word?

A. Well I can only testify to the ones I discussed it with.

Q. I appreciate that, but the ones you know.

A. I never heard anyone make a distinction—such as that.

Cross Examination.

Thereupon Witness Lawrence further testified: I relieved service engineer Johnson in June, 1932, at which time the Mission Theatre was on his schedule: I don't know whether Johnson serviced the theatre while Cawthorn was there; I didn't see Johnson during that period: I know what his sched-

(Testimony of R. E. Lawrence.)

ule contained but I never [691] saw Johnson go to the theatre during that period and know nothing about it from my own knowledge during the period Cawthorne operated that theatre.

Whereupon defendant moved to strike all of Witness Lawrence's testimony on that subject, which motion was granted and to which plaintiff then excepted.

Thereupon Witness Lawrence further testified: I relieved Johnson for two weeks in June, 1932, during which time I serviced the Mission Theatre once; I was servicing downtown theatres in Seattle relieving one or the other engineer; at the time whenever service was required by whoever they could get hold of; there was always a service man in Seattle who could go to Cawthorn's theatre whenever he required one momentarily day or night; I did not testify that Lemieux and Tuckett did not have the trouble that they testified to; so far as I know they may have had all those troubles; there were certain instructions given them which I presume they followed out but I can't testify as to whether they did or not; the only part of the inspections that I can testify to; that they gave the equipment, was during the time while I happened to be in town; when I was in town I made the inspections but there are certain duties connected with the operation of sound motion picture machines which is required to be done every day and so far as I know they gave it to them; aside from that I suppose that

(Testimony of R. E. Lawrence.)

they let me do the inspecting while I was in the theatre; I know that some items I corrected were not done the day before but if I wasn't there I wouldn't know what they did or didn't do; the average exciter lamp burns 100 hours; that lamp didn't get dark in one day or a week, but I didn't testify as to any particular lamp; I said that any exciter lamp I replaced in one of those theatres required replacement; it couldn't get in that condition in one night or a week's time; a new lamp with average hours from sixty to one hundred, operated in the theatre for about six hours a day will last longer than a week; I say that the lamp [692] that I referred to didn't get black in a week because they don't disintegrate that fast; that is my opinion; I couldn't testify when you ask me to pick a lamp out of certain thousands I couldn't say; there would be no way for me to know. [693]

SUR-REBUTTAL.

HAROLD STABLER.

Thereupon Harold Stabler, defendant's witness, heretofore sworn, further testified: I have gone over the figures to ascertain whether the mistakes found by Witness Cooper were actual mistakes and I have a list of them and I found Cooper's corrections were correct and I made a statement showing what effect that would have on the profit or loss sheets

(Testimony of Harold Stabler.)

of the two theatres, which I now produce, which is a comparative statement of mathematical errors between June 1, 1929, and May 1, 1931, and the same statement for the period of May 1, 1931 to May 1, 1933, for the Ketchikan Theatre.

Thereupon defendant's exhibit Y for identification was offered in evidence but rejected upon plaintiff's objection that it was incompetent, irrelevant, and immaterial and not proper Sur-Rebuttal.

W. D. GROSS

Thereupon defendant on his own behalf, having been heretofore duly sworn, further testified: Jack Davis is now in Seattle; he had nothing to do with the keeping of the books.

Defendant Rests

[694]

Thereupon plaintiff requested the Court to instruct the jury as follows:

“You are instructed that the plaintiff claims that the amount to be paid for inspection and minor adjustment services was left in blank in paragraph six of each of the contracts of March 28th, 1929, plaintiff's exhibits Nos. 1 and 3, because the amount thereof could not be deter-

mined at the time that those two contracts were made and that it was understood between plaintiff and defendant that the amount of that weekly charge should be fixed at a later date.

“In this connection, I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties. The plaintiff alleges that the amount to be paid for such services was agreed upon between it and the defendant and that it was to be \$29.75 per week for each theatre and plaintiff further alleges that this agreement was expressed in the supplemental contracts of September 4th, 1929, plaintiff’s exhibits Nos. 2 and 4.”

The Court refused to give the foregoing instruction, either in words or substance, to which refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted.

Thereupon plaintiff requested the Court to instruct the jury as follows:

“The defendant claims that under the original contracts of March 28th, 1929, plaintiff’s exhibits Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in

any way unless such alteration or modification shall be approved by the president or a vice president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.

“You are instructed that the plaintiff has submitted evidence tending to show that R. E. Anderson did have authority from the plaintiff corporation to execute the supplemental contracts of September 4th, 1929, plaintiff’s exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff [695] corporation through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modifying them, have been complied with.”

The Court refused to give the foregoing instruction, either in words or substance, to which refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted.

Thereupon plaintiff requested the Court to instruct the jury as follows:

“You are instructed that under Section 8 of each of the contracts of March 28, 1929, plaintiff’s exhibits Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts,

furnished or supplied by plaintiff; upon delivery thereof and to pay the transportation charges thereon.

“You are instructed that the evidence in this case shows that the plaintiff pursuant to that section of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff’s amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff’s amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$61.92, and that no evidence has been offered by defendant tending to show that those amounts were paid by him to plaintiff at the time of commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action.”

The Court refused to give the foregoing instruction, either in words or substance, to which refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted. [696]

Thereupon plaintiff requested the Court to instruct the jury as follows:

“You are instructed that you cannot consider, in ascertaining the amount of such net usable value, any good will or alleged loss thereof because I have heretofore stricken from this case all matters dealing with the question of good will and loss thereof, and, further, you cannot consider any alleged loss of profits in arriving at the amount of the net useable value of said equipments during said periods because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres.”

The Court refused to give the foregoing instruction, either in words or substance, to which refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted.

Thereupon plaintiff requested the Court to instruct the jury as follows:

“You are further instructed that you cannot allow defendant any damages on account of the purchase or cost of installation of new equipments in either of his said theatres because that is not an element of the true measure of damages in this case.”

The Court refused to give the foregoing instruction, either in words or substance, to which refusal the plaintiff, in the presence of the jury and before it retired for deliberation, excepted.

Thereupon the Court charged the jury as follows: [697]

Same Title of Court and Cause.

COURT'S INSTRUCTION TO THE JURY.

No. 1.

Ladies and Gentlemen of the Jury:

We have now arrived at the stage of this case where it becomes incumbent upon the court to instruct you as to the law that will govern you in your deliberations on this case.

The issues in this case are set out in the Amended Complaint, Amended Answer and Reply to Amended Answer as Amended. The pleadings, however are so long, covering, as they do about one hundred pages, that it will be impossible to give you in these instructions more than the barest outline of the issues involved. However, the pleadings will be taken by you to your jury room for your use in your deliberations in this case, and I suggest and recommend that you refer to them for any matter you do not understand or about which you have any doubt.

This is what is known in law as a Replevin suit, brought by the plaintiff, Electrical Research Products Company, Inc., as plaintiff, against W. D. Gross as defendant to recover certain movietone or sound equipment installed by it in the Gross Coliseum theatres at Juneau and Ketchikan, Alaska.

AMENDED COMPLAINT:

The Amended Complaint pleads two causes of action.

As its First Cause of Action plaintiff alleges in substance that on or about March 28th, 1929, it entered into a written contract with the defendant (Plaintiff's Exhibit 1) whereby it granted to defendant a non-exclusive, non-assignable license to use in defendant's Coliseum Theatre at Juneau for a term of ten years certain movietone or sound equipment designated in said contract as Type 2-S equipment, and that it agreed to install same in said theatres and to make periodical or minor adjustments in said equipment after it was so installed, during the term of said lease. [698]

That in consideration for the lease or license to use said equipment so installed by plaintiff in defendant's said theatre and the other covenants, stipulations and representations set forth in said contract of March 28th, 1929, the defendant agreed to make certain payments and to do and perform certain things on his part, as fully set out in said contract.

The Complaint further alleges in substance:

That on or about September 4th, 1929, the (original) contract of March 28th, 1929, was mutually modified, whereby defendant agreed to pay in addition to any other payments required to be made by defendant by said (original) contract, \$29.75 per week as a "service and inspection payment" throughout the term of the lease granted by said con-

tract of March 28th, 1929, as amended and to pay the same at the times and in the amounts specified in said contract.

Plaintiff then alleges in substance; that it complied with all the terms of said contract of March 28th, 1929, and of the same as alleged to have been modified by the alleged supplemental contract of September 4, 1929 (Plaintiff's Exhibit 2), but that the defendant failed and refused to comply with the same on his part but defaulted and continued to default in the payment of sums due for additional equipment, installation and transportation charges, and in the payment of certain weekly payments for so-called "service charges" alleged to be due under the contract of March 28th, 1929, as alleged to have been modified by the alleged subsequent or supplemental agreement of September 4th, 1929.

Plaintiff then alleges that it is the owner of said equipment and is now lawfully entitled to the possession thereof by reason of its ownership thereof and by reason of the provisions of said agreement as allegedly modified, but that said property is wrongfully detained by the defendant from the plaintiff; that plaintiff has made a demand upon defendant that he return the [699] aforesaid property, and defendant has refused to return it or any part thereof; wherefore plaintiff prays judgment for the return of said property, or if return thereof cannot be had, for the value of said property—alleged to be \$6600.00 and for damages for its detention.

It is admitted, however, that the plaintiff now has the property in question in its possession pending the outcome of this action, and therefore in considering the plaintiff's claim you need consider only the question of the plaintiff's rights to its possession.

SECOND CAUSE OF ACTION:

Plaintiff then sets up a Second Cause of Action against the defendant for the possession of like equipment at Ketchikan, which is in almost identical wording with the first, except that the first cause of action covers the equipment at Juneau and the second cause of action covers the equipment in Ketchikan, and the sums alleged to be due plaintiff differ somewhat in amount.

AMENDED ANSWER:

To Plaintiff's First Cause of Action as set out in its Amended Complaint the defendant has filed his Amended Answer, in which he admits in substance the making of the written contract of March 28th, 1929; but denies that thereafter on or about September 4th, 1929, or at any other time or at all said original agreement was modified in writing or otherwise, or that any modified agreement exists between him and the plaintiff, and denies that there is anything due plaintiff from defendant either on account of additional equipment, installation and transportation charges or that he owes or agreed to pay plaintiff \$29.75 per week or any other sum as a "service and inspection payment" as set out

in the alleged subsequent or supplemental agreement of September 4th, 1929; and the defendant generally denies all of the other allegations of [700] plaintiff's Amended Complaint and that plaintiff is entitled to the possession of said equipment or that said property is unlawfully detained by him.

The defendant however admits that plaintiff made a demand upon him for the return of the property mentioned, and admits that he refused to return said property and that he had not returned the same or any part thereof, at the time this cause of action was begun, nor at any other time.

The defendant then sets up three affirmative defenses to plaintiff's first cause of action.

DEFENDANT'S FIRST AFFIRMATIVE DEFENSE:

In the first of these, after setting up the contract of March 28th, 1929 and alleging that it is still in full force and effect, and has never been modified, rescinded or revoked; and

Referring to plaintiff's allegation that this (original) contract was mutually modified on or about September 4, 1929, by a subsequent or supplement agreement (Plaintiff's exhibit 2) the defendant sets up:

1st. That the alleged subsequent or supplemental agreement of September 4th, 1929, is a mere letter addressed to the defendant by the person whose name is signed to it and does not constitute a con-

tract between the parties in accordance with the provisions embodied in the (original) contract of March 28th, 1929, nor was it signed or executed by the parties at all.

2d. That such writing does not constitute a contract between the parties and is void and unenforceable for the reason that the same is without consideration.

3d. That the signature of the defendant to said writing was obtained by duress in the manner set out on pages 8 and 9 of defendant's amended answer. [701]

DEFENDANT'S SECOND AFFIRMATIVE DEFENSE.

As a second Affirmative Defense to plaintiff's First Cause of Action the defendant alleges in substance, on pages 10 and 11 of his Amended Answer:

That the plaintiff wholly failed to comply with provisions of the contract of March 28, 1929, in that it wholly failed to make the regular periodical inspections and render minor adjustment service, as it was required to do by the terms of said contract. That the plaintiff did not make inspection except that on rare occasions, which occurred at irregular intervals, when the plaintiff caused some inexperienced and unqualified youths to call at the defendant's theatre. These representatives of the plaintiff, however, did not inspect the equipment, nor did they make any adjustments except that in

one or two instances, they would do something to the machinery, the defendant does not know exactly what, which rendered the equipment useless, and put it out of commission, so that the defendant's engineers were compelled to put it back into a state of repair. In this connection, the defendant further avers: That the plaintiff never rendered him any regular periodical inspection, nor minor adjustment service. And the defendant further avers: That on several occasions since the installation of the equipment furnished by the plaintiff to the defendant, the equipment became useless as the result of breakdown occasioned by defects in the machines and otherwise, and that on each and all of such occasions, the defendant notified the plaintiff by wire, asking that a service man be forthwith dispatched to Juneau to repair the equipment; and that on each and every such occasion, the plaintiff either ignored the request of the defendant in this regard, or sent a service man weeks after the breakdown had taken place, so that the defendant was obliged to, and did from the first, hire and keep his own engineers at Juneau, who in every case, made the necessary repairs weeks before the arrival of any service man in the employ of the plaintiff. And [702] in this connection, the defendant further avers: That the plaintiff never sent a service man to Alaska in response to a request for service, by the defendant, or otherwise, in connection with the servicing of defendant's theatre, but made a pretense to comply with such requests by having service men pass

through, en route to the Westward and Interior of Alaska, to stop off and call at the defendant's theatre while the steamer on which they were travelling, was in port; and that in all cases, said service men arrived weeks after the repairs which they were supposed to make had already been made by the defendant's engineers. In this connection, the defendant avers: That the plaintiff never rendered any service to the defendant in connection with the repair or maintenance of the equipment installed, nor did the plaintiff do anything that had the effect of keeping said equipment in running order, or that had the tendency to accomplish this purpose; and in this connection it is alleged that the word "service" when used in connection with equipment by those engaged in the motion picture industry, means the service necessary to keep the equipment in repair at all times.

THIRD AFFIRMATIVE DEFENSE:

For a Third Affirmative Defense to Plaintiff's First Cause of Action, the defendant pleads:

That the contract referred to in the Complaint is illegal and void under the provisions of the Clayton Act and the Sherman Anti-Trust Act; but this Third Affirmative Defense has been stricken from the Answer by order of the Court and is not to be considered by you for any purpose whatever.

DEFENDANT'S COUNTER CLAIMS:

The defendant then sets up Two Counter Claims against the plaintiff's First Cause of Action.

In the First Counter Claim the defendant sets up the execution of the contract of March 28th, 1929; he then claims that [703] he complied with said contract in all respects, and paid to the plaintiff the full sum of \$10,500.00 as principal or rental, and interest thereon in accordance with the provisions of said contract, and in addition thereto paid certain sums for freight and cartage on the same. He then alleges that on April 20th, 1931, the plaintiff, in order to coerce him into the payment of money which he claims was not due or owing, commenced this action and pursuant thereto removed the equipment from his Juneau theatre, and that on account of such wrongful removal he has been damaged on account of damages incident to closing down his theatre until new equipment could be installed, for loss of profits; expenses incurred in connection with the purchase of new equipment to save the business from utter loss; loss of or injury to good will and loss of rental value of the equipment taken, in the various amounts set forth on pages 17 and 18 in paragraphs 8 and 9 of his First Counter Claim.

SECOND COUNTER CLAIM.

By his second counter claim defendant seeks to recover from the plaintiff the sums alleged to have been paid by him to plaintiff under duress on account of weekly service charges in the sums set out in Paragraph 4 on Page 19 of his Answer.

DEFENDANT'S ANSWER TO PLAINTIFF'S
SECOND CAUSE OF ACTION:

Against Plaintiff's Second Cause of Action, which relates to the Coliseum Theatre at Ketchikan, the defendant pleads in substance the same answer and affirmative defenses as he pleads to plaintiff's First Cause of Action.

The affirmative defense to the Second Cause of Action pleaded as the Sixth Affirmative Defense to Plaintiff's Second Cause of Action, is the same as the Third Affirmative Defense pleaded to Plaintiff's First Cause of Action, and like it pleads that the entire contract relied upon by plaintiff is illegal and [704] void under the Clayton Act and the Sherman Anti-Trust Act. This defense also has been ordered stricken from the pleadings by the Court and is not to be considered by you for any purpose whatever.

The Defendant's Third and Fourth Counter Claims deal with the parties' relations relative to the defendant's theatre at Ketchikan and are the same in substance as those set up in the defendant's First and Second Counter Claims, except as to the amounts.

REPLY:

For its Reply to defendant's Amended Answer as Amended the Plaintiff, in substance and effect denies all of the affirmative allegations and new matter set forth in defendant's Answer and Affirmative Defenses to both of its First and Second Causes of Action, and reiterates in substance and effect the

facts as pleaded by it in its Amended Complaint; and the plaintiff specifically denies that the word "service", when used in connection with equipment by those engaged in the motion picture industry, means the service necessary to keep the equipment in repair at all times, as alleged by the defendant; and denies that it failed to render the service and inspection called for by its contract of March 28th, 1929 as allegedly modified by the subsequent or supplemental writing of September 4th, 1929.

To the affirmative defenses and counter claims of defendant the plaintiff has further replied that the alleged contracts of September 4th, 1929 are and were not void for any of the reasons assigned therefor by the defendant and has also denied that in order to secure or compel the signature of defendant to the alleged contract of September 4th, 1929, or the payment of so-called service charges, it threatened, at any time, to remove the equipment either from the Juneau or the Ketchikan theatres; has denied that it coerced the defendant into paying any money and also has denied that it failed to render the service required of it by the alleged [705] contract of September 4th, 1929 or by the original contract of March 28th, 1929 as allegedly modified thereby.

The plaintiff replies affirmatively to the defendant's contentions by alleging that at the time of the execution of the contracts of March 28th, 1929 (exhibits 1 and 3) the plaintiff and the defendant mutually agreed together that the weekly charge for

the periodical inspection and minor adjustment service had not been established and that it was then mutually agreed that the amount thereof should be determined at a later date and that under date of September 4th, 1929 they did mutually agree upon the amount to be paid therefor and thereupon entered into the alleged contracts of September 4th, 1929 (exhibits 2 and 4); that these alleged contracts were actually executed by the defendant on the 30th day of December, 1929; that the defendant on that day ratified said alleged contract of September 4th, 1929, by later accepting the service performed by it up to March 7th, 1931 and by voluntarily paying for the same up to May 24th, 1930.

The plaintiff also sets forth in its reply that it continued to render defendant service from the date of the installation of the two equipments up to the 7th day of March, 1931 and that defendant accepted them up to that time; that on that day and up to the time of the commencement of this suit it was ready, able and willing and offered to continue to render such service but that the defendant from that day on refused to accept them.

The plaintiff also sets forth in its reply that when it rendered such service it relied upon the defendant performing his duties under the alleged contract; that defendant knew that plaintiff thus relied upon his performance and believed that he, the defendant, would perform them, and that defendant, by accepting the service cannot now assert that the alleged contracts providing for them and for pay-

ment therefor, that is—the contracts of September 4th, 1929, are void. [706]

The plaintiff further alleges in its reply that prior to the commencement of this suit and before the United States Marshal removed the equipment from the Ketchikan theatre, the defendant Gross in violation of the terms of the contract of March 28th, 1929, (exhibit 3) had discontinued the use of plaintiff's equipment in said theatre and had removed the same from its place of installation in said Ketchikan theatre and some time prior to the commencement of this action and before the said U. S. Marshal seized said Ketchikan equipment, he, the defendant, had installed therein and was then using other talking equipment. [707]

No. 2.

In an effort to further clarify the issues for you I might say that the plaintiff in this case bases its right to recover generally—on each of its causes of action—on two things:

First: That defendant is indebted to it on account of so-called "service charges" which it alleges to be due and unpaid.

Second: That defendant is indebted to it for additional equipment and spare and renewal parts furnished and delivered, which it alleges are also past due and unpaid.

Both of these claims grow out of and are based on the two contracts of March 28th, 1929, and on

those contracts as alleged to be modified or amended by the later or supplemental agreements of September 4th, 1929—and involve the interpretation of those instruments—and several disputed questions of fact in relation thereto.

Both the plaintiff and defendant admit the execution of the two contracts of March 28th, 1929, and that they are valid and existing contracts and both admit that the movietone or sound equipment was installed by plaintiff in the defendant's two theatres pursuant to those contracts. The plaintiff claims that these two supplemental contracts were entered into for the purpose of establishing the weekly charge to be paid by the defendant to it for "periodical inspection and minor adjustment services" under Section 6 of the contracts of March 28th, 1929. This the defendant denies and points out that under Section 4 of the contract of March 28th, 1929, it is provided:

"Products also agrees to make periodical inspection and minor adjustments in the equipment after it shall have been installed."

and contends that this service was to be performed by plaintiff as a part of that contract and without additional cost. He also sets [708] up that Paragraph 6, which plaintiff sets up was incorporated in the supplemental contract of September 4th, 1929, provides:

"The Exhibitor agrees to pay 'Products' throughout the term of the license hereby

granted a 'service and inspection payment' of \$29.75 per week."

and that the term "service" mentioned in that Paragraph 6, when used in connection with the sale or use of motion picture sound equipment, has a meaning when used by persons engaged in that business, other and different from its ordinary meaning, and that the term "service" as so used, means the service necessary to keep the equipment in repair at all times.

The defendant also claims that the alleged contracts of September 4th, 1929, have no effect upon the defendant Gross, because they were executed without consideration.

In this connection I instruct you that when a party promises to do what he is already legally bound to do, or does what he is already legally bound to do, neither such promise nor act is a valid consideration for another promise.

And in this connection I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28th, 1929, it cannot recover for such services; or if you believe from the evidence that the "service" referred to in the alleged contracts of September 4th, 1929, is something different or in addition to the "inspection and minor adjustment service" re-

ferred to in the contracts of March 28th, 1929, the plaintiff cannot recover therefor unless he has performed such service; and in this connection I instruct you further that there is evidence before you upon the question of what is meant by the term "service", when used in connection with the sale and use of motion picture sound equipment when used by those engaged in the business of supplying and dealing in motion picture sound equipment; and that if you find that this term [709] "service" has a meaning when used by persons so engaged, other and different from its ordinary meaning, you must apply that meaning to the term as used in said supplemental contract of September 4th, 1929. The question of what is meant by the term when so used by persons so engaged, is a question of fact for the jury, and if the term when so used means something other and different from the "inspection and minor adjustment service" hereinbefore referred to, then there was and is a consideration for the alleged contracts of September 4th, 1929, and plaintiff would be entitled to recover therefor if it performed such "service", but would not be entitled to recover therefor unless it did perform and furnish such service, provided, of course, you find that the "service" mentioned in the supplemental contracts of September 4th, 1929, was not the same "service" provided for in Paragraph 4 of the contracts of March 28th, 1929.

No. 3.

The plaintiff claims that the original contracts of March 28th, 1929, were mutually modified by the execution of two new or supplemental agreements under date of September 4th, 1929.

It is then alleged that the defendant agreed by these alleged supplemental agreements to pay a weekly service charge of \$29.75 under each contract. In opposition to this claim the defendant maintains in the first place, that these alleged contracts of September 4th, 1929, were not executed by the parties at all, in that they were not signed by the plaintiff corporation, and in that the name of the plaintiff corporation does not occur in the body of the instruments.

In this connection I instruct you that the alleged contracts are signed by one "Anderson" who signed the same as "Comptroller" without further describing himself, and that the question of whether said "Anderson" was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions. [710]

In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is authorized to alter or modify these agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be desig-

nated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that "Anderson" had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements.

No. 4.

I further instruct you that the defendant also claims that the alleged contracts of September 4th, 1929, which it is claimed by the plaintiff modified the original contracts of March 28th, 1929, are unenforceable against him because his signatures thereto were obtained by duress.

In this connection I instruct you that a contract obtained by duress; that is by oppressing a person by threats so as to deprive him of the free exercise of his will, may be avoided on the ground of duress. The question here is, First: Whether the threats alleged were in fact made by the plaintiff or its authorized agents or representatives; and Second: Whether the defendant was thereby bereft of the free exercise of his will and the quality of mind

essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by [711] the character of the threats, but rather by the effect produced thereby on the mind of the party claimed to have been affected. If the threats are made for the purpose of compelling the doing of that which otherwise would not have been done, and the free will of the alleged victim has been thereby overcome or destroyed, and the alleged victim signs a contract or pays money because of such threats, being at the time, because of such threats, deprived of the free will essential to contractual capacity, it is duress; the material and only material questions being: "Was the threat made for the purpose of overcoming the will of the person threatened?" and "Did it have that effect and was the contract thereby obtained?"

In this connection I instruct you that the defendant claims that the plaintiff's representatives and agents threatened the defendant that unless he signed the alleged contracts bearing date of September 4th, 1929, plaintiff would take out the equipment then in his theatres at Juneau and Ketchikan; that at that time the removal of such equipment would have ruined the defendant's business and caused him great losses; that he signed said alleged contracts bearing date of September 4th, 1929, and each of them, because he believed that the plaintiff and his agent or representative had the power to immediately remove and take away said equip-

ment without any further procedure and without bringing any action therefor; and that he believed that it or they would do so if the said contracts were not immediately signed by him; and that he signed the same solely to protect his business and his property and in order to prevent the losses that would have resulted had he not signed them; and that he would not have signed same or either of them had it not been for the threats so made and the considerations above enumerated.

Therefore, if you find from the evidence that the plaintiff or Mr. Gage, its agent, made the threats referred to for the purpose of forcing the defendant Gross to sign the alleged contracts of September 4th, 1929, and that the defendant, Gross, believed [712] that the plaintiff, or Gage had the power to immediately carry out such threats and would carry out the same unless the alleged agreements of September 4th, 1929, were immediately signed by him, and if you further find that the defendant, as a reasonable man, believed such threats, and that he believed the carrying out of such threats would have resulted in great injury to the business carried on by the defendant in his theatres at Juneau and Ketchikan and would have resulted in great and irreparable loss to him, and further that the defendant signed said contracts in the belief that he had no alternative, and was compelled either to sign said contracts or suffer the loss of his equipment and the consequent loss to or destruction of his business, and that he signed the same solely be-

cludes himself from thereafter avoiding it upon the ground that it was made under duress. [714]

No. 5 $\frac{1}{2}$ -a.

You are instructed that if you find that plaintiff faithfully performed the contracts of March 28th, 1929, and that the contracts of September 4th, 1929 were fairly entered into by and between plaintiff and defendant and that the plaintiff rendered services under them to the defendant and defendant accepted said services though he did not pay for the same then you should return a verdict for the plaintiff.

You are further instructed that even though you should find that the contracts of September 4th, 1929 were made by the defendant under duress, if you further find that the defendant did not repudiate them within a reasonable time after their execution or after he might safely have done so, or that he ratified them and accepted services under them in accordance with these instructions, then, provided you find that plaintiff faithfully performed the contracts of March 28th, 1929 and September 4th, 1929, you should return a verdict for the plaintiff.

No. 5 $\frac{1}{2}$ -b.

If you find from a fair consideration of all the evidence in this case that the contract of September 4, 1929, exhibit "2", relative to the Juneau theatre, was fairly executed between the two parties and that the plaintiff performed the services as con-

templated by said contract relative to the Juneau theatre, or furnished additional equipment and spare and renewal parts to defendant pursuant to said contract of March 28th, 1929, and if you further find that at the time of the commencement of this action the defendant was indebted to the plaintiff in any amount either for any such service or for any such additional equipment or renewal or spare parts, then plaintiff had the lawful right to bring this action and to remove from the defendant's Juneau theatre all of plaintiff's sound reproducing equipment, including all such, if any, additional equipment and spare and renewal parts; and your verdict should be [715] that plaintiff was on April 20th, 1931, and now is, entitled to the possession of said equipment.

If you find from a fair consideration of all the evidence in this case that the contract of September 4th, 1929, exhibit "4" relative to the Ketchikan theatre, was fairly executed between the two parties and that the plaintiff performed the services as contemplated by said contract of March 28th, 1929, exhibit "3" relative to the Ketchikan theatre, or furnished additional equipment and spare and renewal parts to defendant pursuant to said contract of March 28th, 1929, and if you further find that at the time of the commencement of this action the defendant was indebted to the plaintiff in any amount either for any such service or for any such additional equipment or renewal or spare parts, then plaintiff had the lawful right to bring this action to remove from the defendant's Ketchikan theatre

all of plaintiff's sound reproducing equipment, including all such, if any, additional equipment and spare and renewal parts; and your verdict should be that plaintiff was on April 28th, 1931, and now is, entitled to the possession of said equipment.

No. 6.

I further instruct you, Ladies and Gentlemen, that if you find from the evidence under these instructions that there was nothing due the plaintiff from the defendant at the time this action was commenced, then I charge you that the plaintiff had no right to replevin the equipment described in the complaint, and that you must find for the defendant and against the plaintiff upon both of defendant's causes of action.

No. 7.

I instruct you, Ladies and Gentlemen of the Jury, that the agreements of March 28th, 1929, relating to the Juneau and Ketchikan theatres, being Exhibits No. "1" and No. "3" respectively, [716] contain the entire understanding of the respective parties with reference to the subject matter of said agreements and each of them; and that at the time of the execution of said agreements, to-wit, March 28th, 1929, all prior agreements of the parties were merged therein and there was no other understanding, agreement, or representation expressed or implied in any way extending, defining or otherwise relating to the provisions of said agreements or either of them, as to any of the

matters to which said agreements or either of them relate.

And in this connection, I instruct you that said agreements or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment; and that no agreement or understanding, if you find there was any agreement or understanding prior to the execution of said contracts or either of them, to-wit, the 28th day of March, 1929, is binding upon the defendant Gross or upon Electrical Research Products Corporation, the plaintiff herein.

No. 8.

I further instruct you, Ladies and Gentlemen of the Jury, that the defendant set up two Counter-Claims to each of the Causes of Action stated in the plaintiff's complaint; and referring to the first Counter-Claim set up by the defendant to the plaintiff's first Cause of Action, I instruct you that if you find from the evidence under my instructions that the defendant complied with all the terms of the contract, Exhibit "1" and paid to the plaintiff the full sum of Ten Thousand Five Hundred Dollars as principal, and paid the interest thereon in accordance with the provisions of said contract; and in all other respects complied with the terms of said contract to be kept and performed on his part; and that the alleged agreements bearing date of September 4, 1929, received in evidence as Exhibit No. "2", are invalid under the evidence and under my instructions; or that if valid the plaintiff has failed in any

way to comply with the terms thereof; and further that the plaintiff cannot recover against the defendant under the first Cause of Action stated in the complaint; then I instruct you that the defendant has a right to recover a judgment against the plaintiff because of the first Counter-Claim set up in defendant's answer in such sum or sums as you may find he may be entitled to under these instructions.

I further instruct you that if you find that the defendant is entitled to recover from the plaintiff on his first Counter-Claim under the evidence and under my instructions, then I instruct you [717] that he can recover: (1) The rental value of the equipment taken out of his Coliseum Theatre at Juneau for the unexpired portion of the lease embodied in his contract of March 28th, 1929, and in this connection I instruct you that it is admitted by the plaintiff that the rental value of the equipment so taken out is \$1,050.00 per year, and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than \$8,458.30, together with 8% interest thereon from and after the date that such equipment was removed; and that the amount to be allowed by you on this item cannot be more than \$9,627.03.

I further instruct you that if you find that the defendant is entitled to recover on his first Counter-Claim to the first Cause of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau Coliseum Theatre

because of the removal of said equipment; provided, that he can only recover, if at all, such profits as he may have proved himself entitled to under the evidence and these instructions.

And in this connection I instruct you that where a loss of profits results from the destruction, interruption, interference or injury to an established business, such profits may be recovered where the defendant makes it reasonably certain by competent proof what the amount of his loss actually was. In this connection I instruct you that the interest upon the capital invested, plus the expenses of the business, deducted from its income, for at least a few months or a few years prior to the interruption produce the customary monthly or yearly net profits of the business during that time and form a reasonably certain and rational basis for computation from which the jury may lawfully infer what these alleged profits, if any would have been during the alleged interruption if it had not been inflicted.

[718]

In this connection and for the purpose of further defining what has heretofore been said, I further charge you that when a regular and established business, the value of which may be reasonably ascertained, has been wrongfully injured or interrupted, the true general rule for compensating the party injured is to ascertain how much less value the business was by reason of the injury or interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordi-

nary profits derived from it. Such value cannot be ascertained without showing what the usual profits are. Proof of the expenses and of the income of the business for a reasonable time anterior to, and during and after the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present the necessary data for a reasonable and rational estimate of their amount. In this connection, however, I further instruct you that the loss of profits, if you find that there was a loss of profits, must be the proximate, natural and direct result of the alleged wrongful act, provided always, that you find that the removal was unlawful under these instructions, and without the intervention of an independent intervening cause.

In this connection, I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the first Counter-Claim to the first Cause of Action, cannot be more than \$44,000; that being the amount fixed by the pleadings of the defendant. [719]

I further instruct you that in addition to the rental value of the equipment, and in addition to the loss of profits above referred to, the defendant may further recover, if you find from the evidence and

my instructions that he had a right to recover at all under the first Counter-Claim to the first Cause of Action, for such expenses as he may reasonably and prudently have incurred in good faith in attempting to diminish damages such as are held recoverable under my instructions, and this is so whether the effort is successful or not, provided that it was in good faith. However, under this item, the defendant can only recover as in other cases such damages as he has actually proved.

He claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum theatre at Juneau under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are held to be recoverable; and he is entitled to recover such monies even though the installation of such new machinery or equipment did not result in reducing such damages; provided, that the defendant acted in good faith and for the purpose above stated.

No. 9.

I further instruct you, Ladies and Gentlemen of the Jury, with reference to the second Counter-

Claim set up by the defendant to the first Cause of Action stated in plaintiff's complaint, that if you find from the evidence under my instructions that the defendant paid out other monies to the plaintiff for or on account of service charges, and that such payments were made under duress, as duress is elsewhere defined in these instructions, then I [720] instruct you that the defendant is entitled to recover back the monies so paid by him on that account.

No. 10.

I further instruct you, Ladies and Gentlemen of the Jury, that the defendant set up two Counter-Claims to each of the Causes of Action stated in the plaintiff's complaint; and referring to the third Counter-Claim set up by the defendant, which is the first Counter-Claim to the Second Cause of Action, I instruct you that if you find from the evidence under my instructions that the defendant complied with all the terms of the contract, Exhibit "3", and paid to the plaintiff the full sum of \$10,500.00 as principal, and paid the interest thereon in accordance with the provisions of said contract; and in other respects complied with the terms of said contract to be kept and performed on his part; and that the alleged agreements bearing date of September 4th, 1929, received in evidence as Exhibit No. 2 are invalid under the evidence and under my instructions; or that if valid the plaintiff has failed in any way to comply with the terms thereof; and further that the plaintiff cannot recover against the defendant under the Second Cause

of Action stated in the complaint; then I instruct you that the defendant has a right to recover a judgment against the plaintiff because of the Third Counter-Claim set up in defendant's answer in such sum or sums as you may find he may be entitled to under these instructions.

I further instruct you that if you find that the defendant is entitled to recover from the plaintiff on his Third Counter-Claim under the evidence and under my instructions, then I instruct you that he can recover: (1) The rental value of the equipment taken out of his Coliseum Theatre at Ketchikan for the unexpired portion of the lease embodied in the contract of March 28th, 1929, and in this connection I instruct you that it is admitted by the plaintiff [721] that the rental value of the equipment so taken out is \$1,050.00 per year, and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than \$8,458.30, together with 8% interest thereon from and after the date that such equipment was removed; and that the amount to be allowed by you on this item cannot be more than \$9,627.03.

I further instruct you that if you find that the defendant is entitled to recover on his third Counter-Claim to the Second Cause of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau Coliseum theatre because of the removal of said equipment; provided that he can only recover, if at all, such

profits as he may have proved himself entitled to under the evidence and these instructions.

And in this connection I instruct you that where a loss of profits results from the destruction, interruption, interference or injury to an established business, such profits may be recovered where the defendant makes it reasonably certain by competent proof what the amount of his loss actually was. In this connection I instruct you that the interest upon the capital invested, plus the expenses of the business, deducted from its income, for at least a few months or a few years prior to the interruption produce the customary monthly or yearly net profits of the business during that time and form a reasonably certain and rational basis for computation from which the jury may lawfully infer what these alleged profits, if any, would have been during the alleged interruption if it had not been inflicted.

In this connection and for the purpose of further defining what has heretofore been said, I further charge you that when a regular and established business, the value of which may be reasonably ascertained, has been wrongfully injured or interrupted, the true general rule for compensating the party injured is to ascertain how much less value the business was by reason of the injury [722] or interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the

usual profits are. Proof of the expenses and of the income of the business for a reasonable time anterior to, and during and after the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present the necessary data for a reasonable and rational estimate of their amount. In this connection, however, I further instruct you that the loss of profits, if you find that there was a loss of profits, must be the proximate, natural and direct result of the alleged wrongful act, provided, always, that you find that the removal was unlawful under these instructions, and without the intervention of an independent intervening cause.

In this connection, I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the third Counter-Claim to the second Cause of Action, cannot be more than \$44,000.00; that being the amount fixed by the pleadings of the defendant.

I further instruct you that in addition to the rental value of the equipment, and in addition to the loss of profits above referred to, the defendant may further recover, if you find from the evidence and my instructions that he had a right to recover

at all under the third Counter-Claim to the second Cause of Action, for such expenses as he may reasonably and prudently have incurred in good faith in attempting to diminish damages such as are held recoverable under my instructions, and this is so whether the effort is successful or not, provided that it was in good faith. [723] However, under this item the defendant can only recover as in other cases such damages as he has actually proved.

He claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum Theatre at Ketchikan under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are held to be recoverable; and he is entitled to recover such monies even though the installation of such new machinery or equipment did not result in reducing such damages; provided that the defendant acted in good faith and for the purposes above stated.

No. 11.

I further instruct you, Ladies and Gentlemen of the Jury, with reference to the fourth Counter-Claim set up by the defendant which is the Second

Counter-Claim to the Second Cause of Action stated in plaintiff's complaint, that if you find from the evidence under my instructions that the defendant paid out other monies to the plaintiff, for and on account of service charges and that such payments were made under duress, as duress is elsewhere defined, in these instructions, then I instruct you that the defendant is entitled to recover back the monies so paid by him on that account. [724]

No. 11-a.

You are instructed that evidence was received at the trial that defendant by his employees, prior to the service upon him or them of the writ of replevin herein in respect to the Ketchikan theatre, removed from the location and position in that theatre wherein it was installed by plaintiff on or about June 1, 1929, the sound reproducing equipment that was installed therein under the contract of March 28, 1929, plaintiff's exhibit 3.

You are further instructed that section 14 (3) of that contract provides that should said equipment or any part of it be removed, without plaintiff's consent, from the location and position in which it was installed by plaintiff, that such removal should constitute a termination of not only the said contract itself, but also of the license granted in said contract to defendant by plaintiff to use said sound reproducing equipment.

You are instructed that no evidence has been received in this case that plaintiff consented to such removal and therefore if you find that such equip-

ment was or had been removed by defendant from said theatre without plaintiff's consent, prior to the service upon him of the writ of replevin herein, you should return a verdict for the plaintiff covering the sound reproducing equipment at Ketchikan.

No. 11-b.

You are instructed that in this case evidence has been offered as to a competing theatre, namely, the Capitol Theatre, having been reopened in Juneau, Alaska, in a remodeled and a renovated condition and with new, modern and efficient sound reproducing equipment, on January 15, 1931, and as to a competing theatre, namely the Revilla theatre in Ketchikan, Alaska, having been re-opened in a remodeled and renovated condition and with new, modern and efficient sound reproducing equipment, in April, 1932.

If you believe that evidence to be true, then you are entitled in your deliberations to give consideration to the effect, [725] if any, that the operations of said Capitol Theatre had upon the receipts of the Juneau Coliseum Theatre on and after January 15th, 1931, and the effect, if any, that the operations of the Revilla Theatre had upon the receipts of the Ketchikan Coliseum Theatre after April, 1932.

No. 11-c.

You are instructed that no evidence was required to be offered at the trial in order to prove the general financial depression that has prevailed throughout the country during the past several

years, because under the law judicial notice is taken of that fact without the necessity of any evidence being offered thereon; and in your deliberations you may take into consideration that general depression and give it such weight as you may find was its reasonable effect, if any, upon the receipts of either or both of the defendant's Ketchikan and Juneau theatres during the period from April 20th, 1931 to May 1st, 1933 as to the Juneau theatre, and from April 28th, 1931 to May 1st, 1933 as to the Ketchikan theatre.

No. 11-d.

You are instructed that the defendant Gross, by virtue of the contracts of March 28th, 1929, did not acquire the exclusive right or license to use the plaintiff's sound reproducing equipment either in the Town of Juneau or the town of Ketchikan; the plaintiff corporation, at all times, reserved and had the right to sell or lease any of its machines or appliances for the reproduction of sound to any other person in either or both of said towns and the facts, if it be a fact, that said corporation plaintiff did lease or sell the same kind of equipment, or similar to that leased to the defendant Gross, to other moving picture operators at Juneau or Ketchikan, or at both places, has no bearing upon the issues in this case and you should not consider it. [726]

No. 11-e.

You are further instructed that in fixing the amount of damages, if any, that the defendant may

recover in this case, you must eliminate from your consideration entirely any damages on account of loss of good will; extra parts claimed to have been taken by plaintiff from defendant's theatres when it removed, or had removed, the equipment mentioned in its complaint; and installation costs, freight and cartage alleged to have been paid by defendant, for the reason that no evidence was offered in support thereof or they had previously been ordered stricken by the court.

No. 12.

I instruct you relative to the general question of damages that damages may be defined as a pecuniary compensation, recompense or satisfaction for an injury sustained or, as otherwise expressed, the pecuniary consequences which the law imposes for the breach of some duty or the violation of some right. They are those damages which naturally and necessarily result from the wrongful act or omission, that is to say, those which are traceable to and the probable and necessary result of, the injury or wrong done, or which the law implies or presumes to have accrued from the wrong complained of.

The fundamental and cardinal principle of the law of damages is that the injured party shall have compensation for the injury sustained. The injured party is entitled to be placed as near as may be in the condition which he would have occupied had he not suffered the injury complained of.

The rules of law respecting the recovery of damages are framed with reference to the just rights

of both parties; not merely what it might be right for an injured party to receive to afford just compensation for his injury, but also what it is just to compel the other party to pay. And so in no case should [727] the injured party be placed in a better position than he would be in had the alleged wrong not been done.

So in this case, in fixing the amount of damages, if any, which the defendant is entitled to recover, you will bear in mind at all times that the defendant is entitled to recover, if at all, only such amount as will compensate him for the injury sustained, if you find that he has sustained any injury or injuries by reason of the alleged unlawful acts of plaintiff.

No. 13.

This is a civil case, and in its consideration you will bear in mind that the burden of proof in all civil cases rests upon the party holding the affirmative of the issue to prove by a preponderance of the evidence the affirmative matter or issues made up by it or him.

By a preponderance of the evidence is meant the greater weight of the evidence; that evidence which in your opinion is the better evidence and which has the greater value and greater convincing power. This does not necessarily depend upon the number of witnesses testifying with respect to any question of fact, but it simply means that evidence which in your estimation has the greater weight or the greater value or the greater convincing power, and

which is, in your estimation, the most worthy of belief; and so, if after having heard and considered all the evidence in the case as to any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily; or the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed with regard to that issue.

You should first proceed to consider the claims of the plaintiff. When you have done this you should then proceed to consider the claims of the defendant under his Answer, and make your findings accordingly, keeping in mind always the fact that it [728] is incumbent upon each of the parties to, in turn, prove their affirmative allegations by a preponderance of the evidence.

No. 14.

You, Ladies and Gentlemen, are the sole judges of the facts in this case and of the credibility of witnesses and of the effect and value of evidence addressed and submitted to you at the trial.

You are, however, instructed by the court that your power of judging the effect of the evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that a witness wilfully false in one part of his testimony may be distrusted in others; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight, but also according to

the evidence which it is in the power of one side to produce and of the other to contradict; and therefore if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is disclosed; their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing and knowing the facts; the probability of the truth of their testimony; their intelligence or lack of intelligence, and all the other facts and circumstances given or appearing in the evidence surrounding the witnesses at the trial.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds. The direct evidence of one witness who is entitled to full credit is suf- [729] ficient for proof of any fact in this case, and a witness false in one part of his testimony is to be distrusted in other respects. Whenever it is possible you will reconcile the testimony. Where, however, it is not possible to do so, you should give credence to that testimony which, under all the facts and cir-

cumstances of the case, appeals to you to be the most worthy of belief.

In considering your verdict you are instructed that the testimony which has been ordered stricken by the court should not be considered by you for any purpose whatever.

You are also instructed that the opening statements of counsel, and the arguments of counsel are not evidence; and unless supported or borne out by testimony received in this case, are to be entirely disregarded for any purpose.

No. 15

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence admitted, and to apply to those facts the law as given to you by the court in these instructions. The court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of the evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

No. 16

When you retire to your jury room you will take with you the pleadings in this case, the Court's instructions and all [730] the admitted exhibits in the case.

You will then elect one of your number Foreman, whose duty it will be to represent you and speak for you in court and sign the verdict that you agree upon. All twelve of you must concur in any verdict you reach.

You will be given two forms of verdict. When you have finished your deliberations and have arrived at your verdict you will enter in the form of verdict provided for that purpose the verdict you agreed upon. You will then have your foreman sign the verdict so found and return the same into court in the presence of you all; and may your verdict speak the truth, without passion, without sympathy and without prejudice.

GEO. F. ALEXANDER,

Judge.

Given at Juneau, Alaska,
February 13, 1935. [731]

Thereupon plaintiff, in the presence of the jury and before it retired for deliberation, excepted to the court's foregoing instruction (No. 7, Par. 2), reading as follows:

"And in this connection, I instruct you that the said agreements (of March 28, 1929) or either of them, do not require the defendant

Gross to pay the plaintiff for periodical inspection and minor adjustment services.”

which exception was as follows:

“Take exception to instruction number 7, particularly that part of it commencing at line 15, page 23, (2nd Par.) as not being a true statement as to the effect of the contracts exhibits “1” and “3” of March 28th, 1929, and is not a statement in accord with either the law governing the contracts of March 28, 1929, or the facts produced in evidence as shown by the contract itself. We take the position there that throughout the case the omission of the amount in paragraph 6 does not make the service free.”

Thereupon plaintiff, in the presence of the jury and before it retired for deliberation, excepted to the court’s foregoing instruction (No. 2, Par. 8), reading as follows:

“And in this connection, I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts (of September 4, 1929) the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services.”

which exception was as follows:

“We take exception to instruction No. 2 * * * We take an exception to that part of the Court’s instruction commencing with line 20 on page 13 (Par. 8)” * * *

Thereupon plaintiff, in the presence of the jury and before it retired for deliberation, excepted to the court's foregoing instruction (No. 3, Par. 4), reading as follows: [732]

“In this connection, I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is authorized to alter or modify those agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that ‘Anderson’ had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements.”

which exception was as follows:

“We except to that part of the court's instruction No. 3, commencing on line 21, page 15

(Par. 4) down to the remainder of that particular instruction 3, on the ground it does not state the true principle of law applicable to written instruments or contracts particularly, and that neither party is bound by the particular provision that only a president or vice-president could change these contracts if they afterwards agree to change them otherwise.”

Thereupon plaintiff, in the presence of the jury and before it retired for deliberation, excepted to the court's foregoing instructions (Nos. 8 and 10, Pars. 2, 3, 7, 9, these two instructions being the same except that No. 8 related to defendant's Coliseum Theatre at Juneau whereas No. 10 related to defendant's Coliseum Theatre at Ketchikan) reading as follows:

“* * * in this connection I instruct you that it is admitted by the plaintiff that the rental value of the equipment so taken out is \$1,050.00 per year (for each theatre) and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than \$8,458.30 (for each theatre), together with 8% interest thereon from and after the date that such equipment was removed; and that the amount to be allowed by you on this item cannot be more than \$9,627.03 (for each theatre). [733]

“I further instruct you that if you find that the defendant is entitled to recover on his first

(and third) counter claim(s) to the first (and second) Cause(s) of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau (and Ketchikan) Coliseum theatre(s) because of the removal of said equipment;

* * * * *

“I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the first (and third) counterclaims to the first (and second) Cause(s) of action cannot be more than \$44,000.00 (under each counterclaim); that being the amount fixed by the pleadings of the defendant.

* * * * *

“He (defendant) claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum theatre(s) at Juneau (and Ketchikan) under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are

held to be recoverable; and he is entitled to recover such monies even though the installation of such new machinery or equipment did not result in reducing such damages; provided, that the defendant acted in good faith and for the purposes above stated.”

which exception was as follows:

“Also take exception to instruction number 8, Your Honor, particularly upon the ground we claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event, and furthermore, that the defendant can not recover in this action upon his counterclaims in any event, and further, that portion concerning the purchase of new equipment, found on page 27 (last Par.) of that particular instruction, which we contend is not an element of damages in this case. * * * The same exception to instruction 10 as we took to instruction No. 8.”

Thereafter the jury having returned its verdict herein in favor of defendant and against plaintiff and judgment having been entered thereupon the following orders were made or entered herein in pursuance to the rules of this court and at the same term during which said judgment was entered and upon stipulation of the parties [734] herein, namely:

Order entered herein on April 6, 1935, and appearing of record herein, namely:

“IT IS HEREBY ORDERED that execution be stayed herein until June 1, 1935, so that plaintiff may have sufficient time within which to effect its appeal and to give supersedeas and cost bond thereon, and that plaintiff be and is hereby allowed until June 1, 1935, within which to file and have allowed and settled its bill of exceptions herein.”

Order entered herein on May 20, 1935, and appearing of record herein, namely:

“IT IS HEREBY ORDERED that execution be stayed herein until June 12, 1935 so that plaintiff may have sufficient time within which to effect its appeal and to give supersedeas and cost bond thereon and that plaintiff be and is hereby allowed until June 12, 1935 within which to perfect said appeal, to file and have allowed and settled its bill of exceptions herein.”

Order entered herein on June 12, 1935, and appearing of record herein, namely:

“IT IS HEREBY ORDERED that plaintiff be and it is hereby granted until August 1, 1935, within which to file and have allowed and settled its bill of exceptions herein, and that the term of this Court, at which said judgment was entered, is hereby extended for said purpose.”

Order entered herein on July 30, 1935, and appearing of record herein, namely:

“IT IS HEREBY ORDERED that plaintiff be and it is hereby granted until September 1, 1935, within which to file and have allowed and settled its bill of exceptions herein, and that the term of this Court, at which said judgment was entered, is hereby extended for said purpose.” [735]

Order entered herein on August 22, 1935, and appearing of record herein, namely:

“IT IS HEREBY ORDERED that plaintiff be and it is hereby granted until October 15, 1935, within which to file and have allowed and settled its bill of exceptions herein, and that the term of this Court, at which said judgment was entered, is hereby extended for said purpose.”

Order entered herein on October 14, 1935, and appearing of record herein, namely:

“IT IS HEREBY ORDERED that plaintiff be and it is hereby granted until November 15, 1935, within which to file and have allowed and settled its bill of exceptions herein, and that the term of this Court, at which said judgment was entered, is hereby extended for said purpose.”

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

The foregoing Bill of Exceptions was filed on November 8, 1935, within the time allowed for the

filing thereof by order and the rules of this Court and I, the undersigned, District Judge for the First Judicial Division of the Territory of Alaska, who presided at the trial of the above-entitled cause, do hereby certify that the foregoing Bill of Exceptions contains all the material facts, matters, things, proceedings, objections, rulings and exceptions thereto, occurring upon the trial of said cause and not heretofore a part of the record herein, including all evidence adduced at the trial, material to the issues presented by the Assignments of Error herein; and I further certify that the exhibits set forth, referred to, and abstracted therein, including defendant's exhibits H-1, H-2, H-3, H-4, H-5, H-6, H-7 and X, plaintiff's exhibits 7-A, 7-B, 8-A, 8-B, 9-A, 9-B, 10-A, 10-B, 10-C, 10-D, 10-E, 11-A, 11-B, 12-A, 12-B, 13-A, 13-B, 13-C, 13-D, 13-E, 13-F, 13-G, 13-H, 13-I, 13-J, 13-K, 13-L, 13-M, 13-N, 13-O, [736] 13-P, 14-A, 14-B, 14-C, 14-D, 14-E, 14-F, 15, 16, 17, 18, 19, 20, 21-A, 21-B, 21-C, 21-D, 21-E, 21-F, 21-G, 22-A, 22-B, 22-C, 22-D, 22-E, 22-F, 22-G, 23-A, 23-B and 56, the originals of all of which specifically enumerated defendant's and plaintiff's exhibits I certify in my opinion it is necessary and proper should be transferred to the Appellate Court for its inspection and which I hereby direct to be so transmitted, and which are hereby incorporated in and made a part of the foregoing Bill of Exceptions, constitute all the exhibits offered in evidence at the said trial material to the issues presented by the Assignments

of Error herein, and I hereby make all of said exhibits a part of the foregoing Bill of Exceptions; and I hereby settle and allow the foregoing Bill of Exceptions as a full, true and correct Bill of Exceptions in this cause and order the same filed as part of the records herein, and the Clerk of this Court is hereby directed to transmit said Bill of Exceptions with said original exhibits, above specifically enumerated, to the Circuit Court of Appeals for the Ninth Circuit.

I further certify, at defendant's request, that in my opinion it is necessary and proper, that plaintiff's original exhibits 1, 2, 3 and 4, and defendant's original exhibits I, I-1, I-2, I-3, I-4, I-5 and I-6, and K, K-1, K-2, K-3, K-4, K-5 and K-6 should be transferred to the Appellate Court for its inspection, and I hereby direct them to be so transmitted and they are hereby made a part of the foregoing Bill of Exceptions.

I further certify that the foregoing Bill of Exceptions complies with all the rules of this Court relating to the extension of the term for the purpose of presenting, settling and filing the Bill of Exceptions, and all orders made by me extending the time for such presentation, settling and filing, and that the foregoing Bill of Exceptions was presented and is hereby settled and allowed within the time prescribed for that purpose and at the same term of Court at which the judgment in said cause was [737] rendered and entered.

Done in open court this 9th day of November, 1935.

GEO. F. ALEXANDER

District Judge.

[Endorsed]: Entered Court Journal No. 10, pages 79-80.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division, Nov. 9, 1935. Robert E. Coughlin, Clerk, by J. W. Leivers, Deputy. [738]

[Title of Court and Cause.]

PLAINTIFF'S OBJECTIONS Re: BILL OF EXCEPTIONS, AND INCLUSION CERTAIN EVIDENCE THEREIN.

In response to defendant's objections to plaintiff's Bill of Exceptions as presented, plaintiff has prepared and tentatively inserted in that Bill of Exceptions the following additional evidence:

Page Numbers	Exhibits and Name of Witnesses
13 and 14	G. I. Albright
15 and 16	Danner Knowlton
17 and 18	J. D. Darragh, Jr.
19 and 20	Robert C. Little, Jr.
21 and 22	E. S. Tobey, Jr.
23 to 25	F. Foulon
26 and 27	H. C. Hurlburt

Page Numbers	Exhibits and Name of Witnesses
28 to 66	Ralph E. Lawrence
67 to 71	Herbert M. Wilcox
84	I. Goldstein
175 to 180	H. E. Cawthorne
184 to 195	Work sheets of exhibit I
202 to 213	Work sheets of exhibit I-1
216 to 227	Work sheets of exhibit I-2
229 to 240	Work sheets of exhibit I-3
242 to 245	Work sheets of exhibit I-4
261 to 272	Work sheets of exhibit K-1
274 to 285	Work sheets of exhibit K-2
287 to 298	Work sheets of exhibit K-3
300 to 311	Work sheets of exhibit K-4
313 to 316	Work sheets of exhibit K-5
407 to 408	E. B. Clayton
418 to 430	Louis Lemieux
431 to 432	Lockie McKinnon
433 to 439	Ned Lemieux
440 to 442	W. L. Dalner
443 to 444	J. F. Mullen

Last 9 lines of

Page 449 Lawrence Kubley

Last 16 lines, direct
examination,

Page 456 Eric Paulson

484 to 486 Ada W. Sharples

487 to 488 M. E. Monagle

489 to 496 N. A. Robinson

496 to 504 J. S. Briggs

Page Numbers	Exhibits and Name of Witnesses
505 to 509	J. A. Gage [739]
510 to 513	H. M. Wilcox
514	M. E. Monagle
515	R. H. Pearsall
516 to 518	Knowlton, Darragh, Tobey, Little, Foulon and Hurlburt
519 to 521	G. E. Mather
Last 20 lines page	
528 to 530	R. E. Robertson
530	Levinson and Gilmore
531 to 539	R. E. Lawrence
540	Stabler and Gross

Plaintiff contends that all evidence, both testamentary and documentary, relative to services and "service", including definitions thereof, and relative to duress and to any alleged troubles with or repairs in the equipment, which evidence is contained in the testimony of the above named witnesses and in the testimony of the witnesses Gross and Tuckett that have been included to meet defendant's objections to the Bill of Exceptions, is not material or necessary to a consideration of the points raised by its Assignments of Error herein and that the inclusion in the Bill of Exceptions of said evidence unnecessarily burdens the record; further that the work sheets of defendant's exhibits, series I and K, are not necessary for a proper consideration for said Assignments of Error and that

their inclusion in the Bill of Exceptions also unnecessarily burdens the record.

Respectfully submitted,

(Henry Roden)

(R. E. Robertson)

Attorneys for Plaintiff.

[Endorsed]: Copy of the foregoing statement, together with Bill of Exceptions including the above evidence received August 20th, 1935.

J. A. HELLENTHAL

Attorneys for Defendant. [740]

[Title of Court and Cause.]

MINUTE ORDER

Now at this time this matter comes before the court for an order settling and allowing Bill of Exceptions. R. E. Robertson Esq., and Henry Roden Esq., appearing in behalf of plaintiff and H. L. Faulkner Esquire, appearing in behalf of defendant. Counsel submitted arguments in behalf of that part of the testimony in regards to the departure from the territory by Chas. Tuckett. R. E. Robertson advised the court that statements made were included in Bill of Exceptions verbatim to which he takes exception. Court being fully advised signs the order allowing same, and included therein those

portions thereof, embraced in plaintiff's objections heretofore filed therein, to which plaintiff took an exception, which was allowed, and plaintiff also objected to inclusion therein of narrative statements submitted by defendants Counsel re said Tuckett's departure from the Territory, which were included therein on page 478 thereof, and plaintiff's exception thereto was allowed.

The above minute order is as recorded on page 80 of the Civil and Criminal Journal Number 10 and is dated as of November 9th, 1935. [741]

[Title of Court and Cause.]

ORDER ENLARGING RETURN DAY

Now, on this day, upon stipulation of the parties hereto by their respective counsel, and good cause being shown therefor, IT IS HEREBY ORDERED that the return day on the citation on appeal herein be enlarged and that plaintiff have until August 20, 1935, within which to file and docket its record on appeal with the Clerk of the Appellate Court in San Francisco, California.

DONE in open court this 11th day of July, 1935.

GEO. F. ALEXANDER

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division, July 11, 1935. Robert E. Coughlin, Clerk.

Entered Court Journal No. 9, page 438. [742]

[Title of Court and Cause.]

ORDER ENLARGING RETURN DAY

Now, on this day, upon stipulation of the parties hereto by their respective counsel, and good cause being shown therefor, IT IS HEREBY ORDERED that the return day on the citation on appeal herein be enlarged and that the plaintiff have until November 1, 1935, within which to file and docket its record on appeal with the Clerk of the Appellate Court in San Francisco, California.

DONE in open court this 10th day of August, 1935.

GEO. F. ALEXANDER

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division, Aug. 10, 1935. Robert E. Coughlin, Clerk.

Entered Court Journal No. 9, page 466. [743]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING,
ALLOWING AND SETTLING BILL OF
EXCEPTIONS.

Now, on this day, upon the oral stipulation of the parties hereto by their attorneys of record, and it appearing that plaintiff requires further time in which to prepare its bill of exceptions upon its appeal from the judgment heretofore entered in

this cause, and it further appearing that plaintiff was heretofore granted and the term of this court extended until October 15, 1935, within which plaintiff might file and have allowed and settled its bill of exceptions herein, IT IS HEREBY ORDERED *be* and it is hereby granted until November 15, 1935, within which to file and have allowed and settled its bill of exceptions herein, and that the term of this Court, at which said judgment was entered, is hereby extended for said purpose, and that the time for the return of the citation herein be and is hereby extended and enlarged until December 1, 1935.

DONE in open court this 14th day of October, 1935.

GEO. F. ALEXANDER

District Judge.

OK:

R. E. ROBERTSON,
Attorney for Plaintiff.

J. A. HELLENTHAL,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division, Oct. 14, 1935. Robert E. Coughlin, Clerk.

Entered Court Journal No. 10, page 12. [744]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Juneau, Alaska:

Please prepare a transcript of record in the above-entitled cause, including therein the following papers, to-wit:

1. Amended Complaint.
2. Amended Answer, as amended (by interlineation).
3. Demurrer to Amended Answer, as amended.
4. Order (Overruling Demurrer to Amended Answer, as amended), dated January 19, 1935.
5. Reply to Amended Answer, as amended.
6. Verdict.
7. Motion for New Trial.
8. Motion for Judgment Notwithstanding the Verdict.
9. Order, dated February 23, 1935, overruling Motion for New Trial and Motion for Judgment Notwithstanding Verdict.
10. Judgment.
11. Assignments of Error.
12. Petition for Appeal.
13. Order Allowing Appeal.
14. Bond on Appeal.
15. Order approving Bond on Appeal.
16. Original Citation on Appeal.
17. Bill of Exceptions, and Order Allowing It.
18. Plaintiff's Objections re: Bill of Exceptions and inclusion certain evidence therein.

19. Order, dated November 9, 1935, overruling Plaintiff's objections re: Inclusion certain evidence in Bill of Exceptions.

20. Order enlarging Return Day, dated July 11, 1935.

21. Order enlarging Return Day, dated August 10, 1935.

22. Order enlarging Return Day, dated October 14, 1935.

23. This Praecipe.

Kindly prepare said transcript in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit and forward it, together with the original exhibits as specified in the learned Trial Court's order of November 9, 1935, [745] allowing and settling the Bill of Exceptions, in accordance with said rules, to said Circuit Court of Appeals.

R. E. ROBERTSON

Attorney for Plaintiff.

[Endorsed]: Due service of the foregoing Praecipe admitted this November 14, 1935.

J. A. HELLENTHAL

Of Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division, Nov. 15, 1935. Robert E. Coughlin, Clerk, by J. W. Leivers, Deputy.

[746]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1—ss.

CERTIFICATE

I, ROBERT E. COUGHLIN, Clerk of the District Court for the District of Alaska, Division No. 1 hereby certify that the foregoing and hereto attached 747 pages of typewritten matter, numbered from 1 to 747, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as prepared as per the praecipe of Appellant on file herein, and made a part hereof, wherein the ELECTRICAL RESEARCH CORPORATION, INC., a corporation, is appellant and W. D. GROSS, is appellee in case number 3167-A as the same appears of record and on file in my office, and that the same is by virtue of a petition for appeal and a citation issued thereon in this cause and the return thereof in accordance therewith,

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to (\$282.95) Two hundred eighty two and ninety five cents has been paid to me by counsel for appellant.

I do further certify that, in accordance with the order of the learned Trial Court, I return herewith and as a part hereof, the following original exhibits, viz.: Plaintiff's exhibits 1, 2, 3, 4, 7-A, 7-B,

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELECTRICAL RESEARCH PRODUCTS INC.,
a corporation,
Plaintiff-Appellant,
against

W. D. GROSS,
Defendant-Appellee.

APPELLANT'S BRIEF.

R. E. ROBERTSON,
Attorney for Plaintiff-Appellant.

JOHN H. RAY,
H. H. BRELAND,
Of Counsel.

FILED

MAR 26 1936

PAUL P. O'BRIEN

INDEX.

	PAGE
STATEMENT	1
PLEADINGS	2
UNDISPUTED FACTS	3
SPECIFICATION OF ERRORS.....	8
SUMMARY OF APPELLANT'S ARGUMENT.....	16
POINT I—The Court Erroneously Instructed the Jury, in effect, that Defendant Owed Plaintiff nothing for Service Charges and that Plaintiff could not Recover in this Action Upon the Ground of Defendant's Failure to Pay Such Charges.....	17
POINT II—The Court Erroneously Refused Plaintiff's Requested Instruction that at the Commencement of this Action, Defendant Owed \$91.01 for Additional Equipment Furnished by the Plaintiff	22
POINT III—The Court Erroneously Instructed the Jury That the Alleged Agreements of September 4, 1929 "Have No Binding Force or Effect" unless "You Find the Parties Afterwards Voluntarily Ratified these Agreements".....	26
POINT IV—The Court Erroneously Denied Plaintiff's Motion to Strike the Allegations of Duress from Defendant's First and Fourth Affirmative Defenses as Irrelevant and Immaterial.....	32
POINT V—The Court Erroneously Overruled Plaintiff's Demurrer to the Second and Fourth Counterclaims for Monies Alleged to have been Paid to the Plaintiff Under Duress.....	35
POINT VI—The Court Erroneously Instructed the Jury as to the Measure of Defendant's Damages	39
CONCLUSION	53

AUTHORITIES CITED.

	PAGE
Alaska Code of Civil Procedure, §3422.....	35
<i>Blair v. National Reserve Insurance Co.</i> , 199 N. E. 337, 338 (Mass. Supreme Judicial Ct.).....	28
<i>Bowen v. Harris</i> , 59 S. E. 1044.....	41
<i>Central Coal & Coke Co. v. Hartman</i> , 111 Fed. 96, 98 (8th C. C. A.).....	49, 51
<i>Friedman v. McKay Leather Co.</i> , 178 Pac. 139.....	51
<i>Homestead Co. v. Des Moines Electric Co.</i> , 248 Fed. 439, 445-6	43, 49
<i>McGargar v. Wiley</i> , 229 Pac. 665, 667-8.....	37
<i>Peabody v. Interborough Rapid Transit Co.</i> , 202 N. Y. Supp. 298	30
<i>Polk v. Western Assurance Co.</i> , 90 S. W. 397, 398-9 (Mo. Court of Appeals).....	29
<i>Willis v. S. M. H. Corporation</i> , 259 N. Y. 144.....	45
<i>Woodring v. Winner National Bank</i> , 227 N. W. 438	40
Restatement of the Law of Contracts:	
Vol. 1, §331, p. 515.....	40
Vol. 1, §331, p. 517.....	52

No. 8044.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELECTRICAL RESEARCH PRODUCTS INC.,
a corporation,
Plaintiff-Appellant,
against
W. D. GROSS,
Defendant-Appellee.

APPELLANT'S BRIEF.

Statement.

This is an appeal by the plaintiff from a judgment of the District Court of the United States for the Territory of Alaska, Division Number One (Hon. George F. Alexander, Judge), in favor of the defendant for \$58,436.33 (the amount of the jury's verdict against the plaintiff upon defendant's counterclaims), and also for \$7,500 allowed by the Court as defendant's attorney's fee (pp. 123-8*).

* All page references are to the "Transcript of Record" unless otherwise indicated.

The action is in replevin to recover possession of certain talking motion picture equipment which the plaintiff had installed in the defendant's theatres in Juneau and Ketchikan, Alaska, and licensed the defendant to use in those theatres. This equipment was taken by the Marshal under the writ of replevin at the beginning of the action and turned over to the plaintiff, after the defendant had failed to re-bond it or claim a return thereof (pp. 311-315).

The ground upon which the action was based was that plaintiff was entitled to the possession of the equipment because the defendant had defaulted in the payment of sums which he owed the plaintiff under the terms of the license contracts. The substance of the defense was that the defendant owed the plaintiff nothing at the time the action was begun; that the plaintiff, therefore, had no right to replevy the equipment; and that the defendant had a right to counterclaim for damages alleged to have been caused him by the wrongful replevin. Defendant also counterclaimed for sums claimed to have been paid the plaintiff under duress, prior to plaintiff's alleged wrongful replevin.

The jury's verdict was in favor of the defendant, awarding him damages alleged to have resulted from the plaintiff's replevin of the equipment and also awarding him the sums which he claimed to have paid the plaintiff under duress.

The Pleadings.

The amended complaint (hereinafter referred to as the "complaint") contains two identical causes of action, except that one was to recover the equipment at Juneau; while

the other was to recover the equipment at Ketchikan. The gist of each cause of action is that plaintiff was entitled to the possession of the equipment because defendant had failed and refused to pay \$1219.75 due under the terms of the contract, with respect to each theatre, for "inspections and minor adjustments" made by the plaintiff (pp. 3, 9); and had also failed and refused to pay \$29.09, in the case of the theatre at Juneau, and \$61.92, in the case of the theatre at Ketchikan, due for additional equipment furnished to the defendant by the plaintiff (pp. 7, 13-14).

The substance of defendant's amended answer (hereinafter referred to as the "answer") is, briefly, as follows: The original contracts between the parties did not obligate the defendant to pay for inspections and minor adjustment services by the plaintiff. Any alleged subsequent agreement by the defendant to pay for these services was void for lack of consideration and also because it was obtained by duress. Plaintiff's wrongful replevin of this equipment damaged the defendant who counterclaims for those damages and also for sums he claims to have paid the plaintiff under duress.

Defendant's third and sixth affirmative defenses, based upon plaintiff's alleged violation of the Anti-trust Laws, were withdrawn on the trial (p. 315).

Undisputed Facts.

The following facts appear from the undisputed evidence at the trial:

On March 28, 1929, plaintiff and defendant entered into two contracts, identical in their terms, except that one related to defendant's theatre at Juneau, Alaska, and the

other related to defendant's theatre at Ketchikan, Alaska (pp. 170-188). By these contracts, plaintiff agreed to install certain patented talking motion picture equipment in defendant's theatres and licensed the defendant to use such equipment in those theatres for ten years. Thereafter, plaintiff duly installed this equipment in defendant's theatres—at Juneau on May 20, 1929, and at Ketchikan in the middle of June, 1929 (pp. 318-19).

The contracts (which were printed forms, p. 188) contained the following provisions:

“Instruction and inspection service.

4. * * * * *

“Products* also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed.

* * * * *

“Service inspection charge.

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the ‘Service Day’ and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products regular schedule of such charges as from time to time established. Under Products’ present schedule, the service and inspection payment shall be \$..... per week, which charge shall not be exceeded during the first two years of the period of said license and there-

* Throughout these contracts, the plaintiff is referred to as “Products”.

after for the balance of the term of said license shall not exceed the sum of \$..... per week.”

* * * * *

“Payment for parts, etc.

8. The Exhibitor agrees to pay to Products its installation charges as from time to time established for any additional equipment or spare or renewal parts, furnished or supplied by Products, upon delivery thereof and to pay the transportation charges thereon.”

On September 4, 1929, plaintiff's Comptroller, Anderson (who had executed the original contracts of March 28, 1929 on behalf of the plaintiff), wrote the defendant two identical letters, except that one related to the theatre at Juneau and the other to the theatre at Ketchikan (pp. 189-91). A copy of the letter relating to the Juneau theatre is as follows (pp. 189-90):

“ELECTRICAL RESEARCH PRODUCTS INC.

Acoustic Department
250 West 57th Street
New York, N. Y.

SUBSIDIARY OF
WESTERN ELECTRIC COMPANY
Incorporated

September 4, 1929 [126]

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of Western Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the 'Service Day' and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska from time to time established. Under Products' present schedule, the service and inspection payment shall be \$29.75 per week, which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means of transportation incurred in connection with emergency service units.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Very truly yours,

(Signed) R. E. ANDERSON,
Comptroller."

In December, 1929, defendant signed these letters beneath the word "Accepted", written at their foot (pp. 28, 55) and left them in the office of plaintiff's Seattle representative. At that time, defendant also paid the accrued service and inspection charges computed from the date of the installation of the equipment at \$29.75 per week and continued to pay these charges at that rate through May 24, 1930. He made no payments for service and inspection rendered after that date, although regularly billed therefor and repeatedly urged to pay (pp. 298-9).

On the trial, plaintiff introduced in evidence the testimony of its service men to the effect that they made "periodical inspection and minor adjustments in the equipment," until shortly before this action was begun. This evidence was uncontradicted. Indeed, defendant's witnesses admitted that plaintiff's service men made such inspection and minor adjustments. The Manager of defendant's theatres testified that plaintiff's engineer, Knowlton, made a "thorough inspection"; that he remembered all the other inspection men and had "gone over all these inspection reports" and "checked them carefully to see what these men did, and none of them reported doing anything other than inspection and minor adjustments; *these engineers, from first to last, did nothing except making inspections and minor adjustments*" (p. 673). (Italics ours.)

Plaintiff also showed, at the trial, that it furnished defendant with additional equipment and parts for which there was due and unpaid \$91.09 at the beginning of this action (pp. 298-9). This evidence was wholly uncontradicted by the defendant.

The contracts of March 28, 1929, provided that title to this equipment should remain at all times in plaintiff (p. 179) and that it should have the right of repossession in the event of defendant's failure to pay any sums due under the contract (pp. 182-3).

Plaintiff's demand for this equipment and defendant's refusal thereof are admitted (Answer, par. VIII, pp. 25, 52-3).

The equipment at Juneau was replevied on April 20, 1931 (p. 314) and at Ketchikan on April 28, 1931 (p. 311). With only one day's shut down at Juneau (p. 353), defendant continued to operate both his theatres with other equipment which he bought, until May 1, 1933, when he leased his theatres to one Shearer (pp. 363, 367).

Specification of Errors.

The following are the errors which the appellant asserts and intends to urge upon this appeal:

1. The Court erred in instructing the jury as follows (Court's instruction No. 2, p. 994):

“And in this connection, I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts [of September 4, 1929] the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services.”

2. The Court erred in instructing the jury as follows (Court's instruction No. 7, p. 1005):

“And in this connection, I instruct you that the said agreements [of March 28, 1929] or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment services.”

3. The Court erred in refusing to give plaintiff's requested instruction No. 2, as follows (pp. 975-6):

“You are instructed that the plaintiff claims that the amount to be paid for inspection and minor adjustment services was left in blank in paragraph six of each of the contracts of March 28th, 1929, plaintiff's exhibits Nos. 1 and 3, because the amount thereof could not be determined at the time that those two contracts were made and that it was understood between plaintiff and defendant that the amount of that weekly charge should be fixed at a later date.

“In this connection I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties. The plaintiff alleges that the amount to be paid for such services was agreed upon between it and the defendant and that it was to be \$29.75 per week for each theatre and plaintiff further alleges that this agreement was expressed in the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4.”

4. The Court erred in instructing the jury as follows (Court's instruction No. 3, pp. 996-7):

“In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is authorized to alter or modify those agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that ‘Anderson’ had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterward voluntarily ratified these agreements.”

5. The Court erred in refusing to give plaintiff’s requested instruction No. 3, as follows (pp. 976-7):

“The defendant claims that under the original contracts of March 28th, 1929, plaintiff’s exhibits Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in any way unless such alteration or modification shall be approved by the president or a vice-president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.

“You are instructed that the plaintiff has submitted evidence tending to show that R. E. Ander-

son did have authority from the plaintiff corporation to execute the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff corporation through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modifying them, have been complied with."

6. The Court erred in overruling the plaintiff's demurrer to the second and fourth counterclaims for failure to state facts sufficient to constitute a counterclaim to the amended complaint herein (pp. 77, 79).

7. The Court erred in denying plaintiff's motion to strike out section (d) of paragraph 3 of the First and Fourth affirmative defenses in Defendant's Amended Answer, as Amended, upon the ground that the allegations of said section were irrelevant, incompetent and immaterial (p. 168).

8. The Court erred in refusing to give plaintiff's requested instruction No. 13, as follows (pp. 977-8):

"You are instructed that under Section 8 of each of the contracts of March 28, 1929, plaintiff's exhibits Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts, furnished or supplied by plaintiff, upon delivery thereof and to pay the transportation charges thereon.

"You are instructed that the evidence in this case shows that the plaintiff pursuant to that sec-

tion of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$61.92, and that no evidence has been offered by the defendant tending to show that those amounts were paid by him to plaintiff at the time of the commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action."

9. The Court erred in instructing the jury as follows (Court's instructions Nos. 8 and 10, which instructions were identical except No. 8 referred to the Juneau Theatre and first counterclaim and No. 10 to the Ketchikan Theatre and third counterclaim):

"* * * in this connection I instruct you that it is admitted by the plaintiff that the rental value of the equipment so taken out is \$1,050.00 per year [for each theatre] and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than \$8,458.30 [for each theatre], together with 8% interest thereon from and after the date that such equipment was removed; and that the amount to be allowed by you

on this item cannot be more than \$9,627.03 [for each theatre] (p. 1006).

* * * * *

“I further instruct you that if you find that the defendant is entitled to recover on his first [and third] Counter Claim[s] to the first [and second] Cause[s] of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau [and Ketchikan] Coliseum theatre[s] because of the removal of said equipment; (p. 1006):

* * * * *

“I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the first [and third] counterclaims to the first [and second] Cause[s] of action cannot be more than \$44,000.00 [under each counterclaim]; that being the amount fixed by the pleadings of the defendant (p. 1008).

* * * * *

“He [defendant] claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum theatre[s] at Juneau [and Ketchikan] under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are held to be recoverable; and he is entitled to recover such monies

even though the installation of such new machinery or equipment did not result in reducing such damages; provided, that the defendant acted in good faith and for the purposes above stated'' (p. 1009).

10. The Court erred in refusing to give plaintiff's requested instruction No. 18B, as follows (p. 979):

''You are instructed that you cannot consider, in ascertaining the amount of such net useable value, any good will or alleged loss thereof because I have heretofore stricken from this case all matters dealing with the question of good will and loss thereof, and, further, you cannot consider any alleged loss of profits in arriving at the amount of the net useable value of said equipments during said periods because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres.''

11. The Court erred in refusing to give plaintiff's requested instruction No. 22, as follows (p. 979):

''You are further instructed that you cannot allow defendant any damages on account of the purchase or cost of installation of new equipments in either of his said theatres because that is not an element of the true measure of damages in this case.''

12. The Court erred in admitting in evidence, over the objection and exception of the plaintiff, certain testimony of defendant, W. D. Gross, the full substance of which is as follows (pp. 361-2):

''Q. What did you do in the way of trying to remedy the sound and make it better?

A. Tried some other equipment; we borrowed some better equipment—after—and couldn't do it any good.

Q. What effect did that have on your business?

Mr. ROBERTSON: Objection as incompetent, irrelevant and immaterial.

The COURT: Overruled. I think the question is competent; he may answer.

Mr. ROBERTSON: Exception.

Q. Now, Mr. Gross, what effect, if any, did the fact that you had inferior equipment in your theatre have upon the business of the theatre?

Mr. ROBERTSON: May I ask that my objection be considered as going to all this line of testimony?

The COURT: Very well.

A. Lost business. It began to go down, lost business.

* * * * *

“The effect upon the profits was that I considered I lost from about two to three thousand dollars a month in Juneau and the same in Ketchikan.”

Summary of Appellant's Argument.

The appellant submits that the judgment appealed from should be reversed upon any one of the following grounds:

I. The Court erroneously instructed the jury, in effect, that defendant owed plaintiff nothing for service charges and that plaintiff could not recover in this action upon the ground of defendant's failure to pay such charges.

II. The Court erroneously refused plaintiff's requested instruction that at the commencement of this action defendant owed \$91.01 for additional equipment furnished by the plaintiff.

III. The Court erroneously instructed the jury that the alleged agreements of September 4, 1929 "have no binding force or effect" unless "you find the parties afterwards voluntarily ratified these agreements."

IV. The Court erroneously denied plaintiff's motion to strike out the allegations of duress from defendant's first and fourth affirmative defenses as irrelevant and immaterial.

V. The Court erroneously overruled plaintiff's demurrer to the second and fourth counterclaims for monies alleged to have been paid to the plaintiff under duress.

VI. The Court erroneously instructed the jury as to the measure of defendant's damages.

P O I N T I .

The Court erroneously instructed the jury, in effect, that defendant owed plaintiff nothing for service charges and that plaintiff could not recover in this action upon the ground of defendant's failure to pay such charges.

In its charges to the jury, the Court quite properly outlined the issues in this action as follows (p. 992):

“In an effort to further clarify the issues for you I might say that the plaintiff in this case bases its right to recover generally—on each of its causes of action—on two things:

First: That defendant is indebted to it on account of so-called ‘service charges’ which it alleges to be due and unpaid.

Second: That defendant is indebted to it for additional equipment and spare and renewal parts furnished and delivered which it alleges are also past due and unpaid.”

Having thus stated the two grounds upon which the action was based, the Court then proceeded to strike out the first ground completely by instructing the jury as follows (p. 994):

“And in this connection I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28th, 1929, it cannot recover for such services”;

The only thing the jury could possibly "believe from the evidence", was the admitted and unquestionable fact that "at the time of the execution of these alleged contracts of September 4, 1929, the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929." Those contracts expressly so provided, as follows (pp. 175-6):

"Products [plaintiff] also agrees to make periodical inspection and minor adjustments in the equipment after it shall have been installed."

This language in the contracts of March 28, 1929 meant, as a matter of law, that the plaintiff was "legally bound to render the defendant periodical inspection and minor adjustment services under the contracts of March 28, 1929," and the jury could not believe anything else. Hence in telling the jury that if they believed this, the plaintiff "cannot recover for such services," the Court really directed a verdict for the defendant, insofar as plaintiff's case was based upon defendant's failure to pay for those services.

Moreover, this instruction was clearly erroneous. What possible reason was there for barring plaintiff's recovery because it was "already legally bound" to render these services? The only explanation of this extraordinary ruling of the Court's is found in its subsequent instruction to the jury as follows (p. 1005):

"And in this connection, I instruct you that said agreements [of March 28, 1929] or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment."

In other words, the Court's ruling was based upon this theory: the contracts of March 28, 1929, did not require the defendant to pay for these services. Hence, if plaintiff was legally bound by these contracts to render these services, it was bound to do so free of charge; and if it was bound to render these services free, defendant's alleged subsequent agreement of September 4, 1929, to pay \$29.75 per week for these services was void for lack of consideration and the plaintiff, therefore, cannot recover for such services.

We submit that the theory just stated is clearly erroneous, since the contracts of March 28, 1929, *did* require the defendant to pay for these services and plaintiff was *not* legally bound by their terms to render such services free. These contracts expressly provided as follows (pp. 175, 177):

“Instruction and inspection service.

4. * * * * *

“Products also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed.

* * * * *

“Service inspection charge.

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the “Service Day” and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such

payment shall be in accordance with Products regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be \$..... per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of \$..... per week."

What can the above language mean except that plaintiff was to make "periodical inspection and minor adjustments" and defendant was to pay plaintiff for such services a "service and inspection payment * * * in accordance with Products' [plaintiff's] regular schedule of such charges"? To say, as the Court did, that the above provisions "do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment" is, we submit, directly opposed to the express language of these provisions.

True, the last sentence of paragraph 6, quoted above, contained unfilled blanks and was, therefore, meaningless. However, that could not possibly affect the remaining provisions of the paragraph. Leaving these blanks in this printed form of contract unfilled merely had the effect of eliminating this sentence from the contract as meaningless and unenforceable. However, this no more affected the other provisions of this paragraph than leaving blank a provision in the judgment (as was done, in the case at bar, p. 127), affected the remaining provisions of the judgment.

Apparently, defendant's contention is, that the "service and inspection payment" which defendant agreed to pay, in paragraph 6 of the contracts of March 28, 1929 (p. 177), was a payment, not for the "periodical inspec-

tion and minor adjustments" which plaintiff agreed to make, in paragraph 4 of these same contracts (p. 175), but for an entirely different "service"; and that mere "periodical inspection and minor adjustments" were to be made by the plaintiff without a separate charge therefor.

This contention of the defendant's is, we submit, clearly unsound. The only "service" which plaintiff anywhere agreed to render was the "periodical inspection and minor adjustments" provided for in paragraph 4. Hence, defendant's agreement, in paragraph 6, to pay a "service and inspection payment" was necessarily an agreement by him to pay for plaintiff's "periodical inspection and minor adjustments," that being the only "service" which plaintiff had agreed to render and hence the only service to which this "service and inspection payment" could possibly refer.

We therefore submit that the Court committed reversible error in its instructions above referred to and emphasized that error by refusing the following instruction requested by plaintiff (p. 976):

"In this connection, I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties."

P O I N T I I .

The Court erroneously refused plaintiff's requested instruction that at the commencement of this action, defendant owed \$91.01 for additional equipment furnished by the plaintiff.

As seen above, this action was based upon two grounds: first, that defendant was indebted to plaintiff for unpaid service charges; and, second, that defendant was indebted to plaintiff for additional equipment and parts. As also seen above, the Court, in effect, struck the first ground out of the case, leaving plaintiff's right of recovery hanging solely upon defendant's indebtedness for additional equipment. This sole remaining ground of recovery fared little better at the Court's hands.

On the trial, plaintiff proved by uncontradicted, documentary evidence that it furnished additional equipment and parts to the defendant; that the defendant received, and receipted for, this equipment; and that there was due and unpaid, when this action was begun, \$29.09 for such equipment furnished at Juneau and \$61.92 for such equipment furnished at Ketchikan (pp. 297-310). Although the defendant and his accountants took the stand, this evidence of defendant's indebtedness and failure to pay was undisputed.

If plaintiff had so requested, it would have been entitled to a directed verdict in its favor because of this undisputed evidence. However, the plaintiff did not request a directed verdict but asked merely for the following instruction (pp. 977-8):

“You are instructed that under Section 8 of each of the contracts of March 28, 1929, plaintiff's exhibits

Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts, furnished or supplied by plaintiff; upon delivery thereof and to pay the transportation charges thereon.

“You are instructed that the evidence in this case shows that the plaintiff pursuant to that section of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff’s amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff’s amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of \$61.92, and that no evidence has been offered by defendant tending to show that those amounts were paid by him to plaintiff at the time of commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action.”

The Court refused the above requested instruction (p. 978). This, we submit, was error. Not only did the Court nowhere else give the substance of this requested instruction but, on the contrary, the instruction which the Court did give on this matter was extremely confusing, if not actually erroneous. The instruction given was as follows (No. 5½-b, pp. 1002-3):

“If you find from a fair consideration of all the evidence in this case that the contract of September 4, 1929, exhibit ‘2’, relative to the Juneau theatre, was fairly executed between the two parties and that the plaintiff performed the services as contemplated by said contract relative to the Juneau theatre, or furnished additional equipment and spare and renewal parts to defendant pursuant to said contract of March 28th, 1929, and if you further find that at the time of the commencement of this action the defendant was indebted to the plaintiff in any amount either for any such service or for any such additional equipment or renewal or spare parts, then plaintiff had the lawful right to bring this action and to remove from the defendant’s Juneau theatre all of plaintiff’s sound reproducing equipment, including all such, if any, additional equipment and spare and renewal parts; and your verdict should be that plaintiff was on April 20th, 1931, and now is, entitled to the possession of said equipment.”

We submit that the meaning of the foregoing instruction is, to say the least, obscure and confusing. Does the plaintiff’s right to recover for the additional equipment depend, under the above instruction, on whether the “contract of September 4, 1929 * * * was fairly executed”? If so, the instruction was clearly erroneous, since, admittedly, the contracts of September 4, 1929 related in no way to additional equipment but only to service charges (pp. 189-90).

Whatever the meaning of the foregoing instruction was, it did not clearly instruct the jury that, regardless of plaintiff’s right to recover for service charges, it was entitled to recover in this action if the jury believed plaintiff’s undisputed evidence as to the additional equipment.

Although the amounts due for additional equipment and parts, at the time this action was begun, were small (\$91.01), the provision of the contracts of March 28, 1929, is clear that the defendant was in default upon his failure or refusal "to pay any of the items or sums herein agreed to be paid" (p. 180) and that the plaintiff had the right of re-possession in the event of defendant's failure to pay any sums due under the contract (p. 182). The defendant not only does not question the validity of these provisions but, on the contrary, asserts that the contracts containing them are "in full force and effect" and have "never been modified, rescinded or revoked" (pp. 26, 53).

We therefore submit that the Court's refusal of plaintiff's requested instruction, quoted above, was error.

POINT III.

The Court erroneously instructed the jury that the alleged agreements of September 4, 1929 "have no binding force or effect" unless "you find the parties afterwards voluntarily ratified these agreements."

The defendant contended, on the trial, that the agreements of September 4, 1929 were not binding upon him because they were not binding on the plaintiff, not having been executed by plaintiff's President or Vice President or one authorized in writing by these officers, as required by Section 20 of the contracts of March 28, 1929 (pp. 186-7). The Court adopted this contention of the defendant's and so instructed the jury, with the single qualification that if "you find the parties afterwards voluntarily ratified these agreements," then they were valid. The Court's instruction on this point is as follows (No. 3, pp. 996-7):

"The plaintiff claims that the original contracts of March 28, 1929, were mutually modified by the execution of two new or supplemental agreements under date of September 4th, 1929.

"It is then alleged that the defendant agreed by these alleged supplemental agreements to pay a weekly service charge of \$29.75 under each contract. In opposition to this claim the defendant maintains in the first place, that these alleged contracts of September 4th, 1929, were not executed by the parties at all, in that they were not signed by the plaintiff corporation, and in that the name of the plaintiff corporation does not occur in the body of the instruments.

"In this connection I instruct you that the alleged contracts are signed by one 'Anderson' who

signed the same as 'Comptroller' without further describing himself, and that the question of whether said 'Anderson' was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions.

"In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is authorized to alter or modify these agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that 'Anderson' had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements."

It will be observed that under the Court's ruling, just quoted, these contracts of September 4, 1929 were invalid unless the *defendant*, as well as the plaintiff, ratified these agreements, the Court's instruction being that these contracts were void unless "the parties afterwards voluntarily ratified these agreements."

We submit that the foregoing instruction was erroneous. In the first place, if ratification by either party was necessary, in order to render these contracts valid, it was only plaintiff's ratification, and not defendant's, that was necessary. The provision in the contracts of March 28, 1929, that any "alteration or modification shall be approved in writing by the president or a vice-president or by such representative as may from time to time be designated in writing by either of such officers" (p. 186) was clearly inserted in these contracts for the sole benefit of the plaintiff and no waiver or ratification of such waiver by the defendant was necessary. It was therefore error for the Court to tell the jury that the plaintiff could not recover on these contracts unless the defendant as well as the plaintiff ratified them after they were executed.

In the second place, no ratification by either party was necessary if, in fact, Anderson had authority to sign these contracts for the plaintiff at the time he did so. The theory of the Court's instruction that a contract cannot be altered by an officer duly authorized by the Board of Directors to make such alteration, if the contract forbids such alteration, is clearly unsound. All that is necessary to change a contract, including a provision in it expressly forbidding such change, is the consent of both parties to the contract. It is legally impossible for parties to make a binding agreement that they shall not change the contract or shall change it only in a certain specified way. As said in *Blair v. National Reserve Insurance Co.*, 199 N. E. 337, 338 (Mass. Supreme Judicial Ct.):

"A long line of decisions in this Commonwealth establishes the general rule that provisions or con-

ditions in an insurance policy which by their terms cannot be altered or waived except by certain specified officers or agents or in certain specified ways, as in writing or by endorsement on the policy, are integral parts of the policy and until revoked or modified in some legally recognized manner are valid and binding upon the insured. * * * Nevertheless, it is recognized, even in cases which illustrate the general rule, that the Company cannot contract itself out of the legal consequences of its subsequent acts. *It necessarily follows that it remains legally possible for the Company, by duly authorized action, to destroy the special protection originally set up in its favor in any manner which is sufficient in law to bring about that result, whether or not the method adopted is in accord with the terms of the original agreement.* It is the rule as to contracts in general that parties cannot tie up by contract their freedom of dealing with each other.” (Italics ours.)

So, in the case at bar, if, in fact, Anderson was authorized by the plaintiff to make these agreements of September 4, 1929 (as he unquestionably was, p. 192), they became binding on the plaintiff immediately upon their execution by him, as its authorized official, even though he was not the one designated in the original contracts of March 28, 1929; and “ratification” was wholly unnecessary.

Similarly, in *Polk v. Western Assurance Co.*, 90 S. W. 397, 398-9 (Mo. Court of Appeals):

“But parties who have the power to make a contract have the power to unmake or modify it regardless of self-imposed limitations, and notwithstanding they insert in their written contract an agreement expressed in the strongest terms, prohibiting

its alteration except in a particular manner, they may, by a subsequent agreement based upon a sufficient consideration, modify their contract in any manner they choose.”

In *Peabody v. Interborough Rapid Transit Co.*, 202 N. Y. Supp. 287, Judge Lehman (now a member of the New York Court of Appeals) said (p. 290):

“While parties to a contract may provide that the contract cannot be changed without certain formalities, they may themselves waive these formalities, and it would be paradoxical to hold that parties who are free agents may by agreement create obligations towards each other which by agreement they cannot also dissolve.”

We therefore submit that it was reversible error for the Court to tell the jury, as it did, that “these alleged agreements of September 4, 1929 have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements,” (p. 997). If, as the evidence clearly shows (p. 192), Anderson was authorized by plaintiff’s Board of Directors to execute these contracts of September 4, 1929, the plaintiff was bound by them immediately upon their execution by the parties, irrespective of any subsequent ratification.

Not only did the Court erroneously instruct the jury as stated above but when plaintiff’s counsel requested the following instruction to correct that error, it was refused by the Court (pp. 976-7):

“The defendant claims that under the original contracts of March 28th, 1929, plaintiff’s exhibits

Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in any way unless such alteration or modification shall be approved by the president or a vice president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.

“You are instructed that the plaintiff has submitted evidence tending to show that R. E. Anderson did have authority from the plaintiff corporation to execute the supplemental contracts of September 4th, 1929, plaintiff’s exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff corporation through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modifying them, have been complied with.”

POINT IV.

The Court erroneously denied plaintiff's motion to strike the allegations of duress from defendant's first and fourth affirmative defenses as irrelevant and immaterial.

Section (d) of defendant's first and fourth affirmative defenses (pp. 29-31, 56-58) consists solely of allegations that the alleged contracts of September 4, 1929, are void for duress. Plaintiff moved to strike this section from both defenses upon the ground that it was irrelevant and immaterial (p. 168). The Court denied this motion (p. 168). We submit that this was error.

Assuming, for argument's sake, that defendant's signature to the agreements of September 4, 1929, was obtained, as he claims, by duress, that fact would not be a defense to this action. If the agreements of September 4, 1929, are void for duress, then the original agreements of March 28, 1929, are in full force and effect, as defendant not only admits but strenuously asserts in both these affirmative defenses (par. II, pp. 26, 53). Under those agreements (which are expressly made part of these defenses, pp. 26, 53), defendant owes precisely the same amount as under the alleged agreements of September 4, 1929. By the agreements of March 28, 1929, defendant was obligated to pay "in accordance with Products' [plaintiff's] regular schedule for such charges, as from time to time established." (p. 177). Under this provision, the right to establish this "regular schedule of such charges" was solely in the plaintiff. Defendant's agreement to this schedule was not at all necessary in order for it to be binding upon him.

He had already agreed, by the admittedly valid contracts of March 28, 1929, to pay whatever price plaintiff should establish from time to time as its "regular schedule of charges."

What was plaintiff's "regular schedule of such charges", at the time in question? Clearly, under the very allegations of these defenses themselves, it was \$29.75 per week—the amount fixed by Products' letters of September 4, 1929 to the defendant, which letters are incorporated in these defenses (pp. 27-28). Even if these letters do not constitute valid contracts because defendant's signature to them was obtained by duress, they are, nevertheless, perfectly competent evidence to show what plaintiff's regular schedule of such charges was at this time. These letters recite on their face, as follows (p. 28):

"The amount of such payment shall be in accordance with Products' regular schedule of such charges for theaters in Alaska as from time to time established. *Under Products' present schedule, the service and inspection payment shall be \$29.75 per week, * * **". (Italics ours.)

If these letters of September 4, 1929 are not contracts, they, nevertheless, establish the amount of plaintiff's regular schedule of charges for periodical inspection and minor adjustment services which defendant bound himself to pay by the terms of the contracts of March 28, 1929.

We, therefore, submit that the allegations of duress in section (d) of the first and fourth affirmative defenses are wholly irrelevant and immaterial and constitute no defense. This is obviously so, in so far as plaintiff's cause of action is based upon defendant's indebtedness for the

additional equipment and parts furnished, since defendant does not, and could not, claim that this indebtedness was in any way incurred under duress. It is equally so, we submit, as to plaintiff's claim based upon defendant's failure to pay service charges; for even if defendant's agreements of September 4, 1929, to pay \$29.75 per week for these services, are void for duress, defendant is still bound in the same amount by the contracts of March 28, 1929, obligating him to pay plaintiff's "regular schedule of such charges," which regular schedule was shown to be \$29.75 per week by the very documents which defendant attacks.

The Court's error in not striking from the case this wholly irrelevant matter of duress was inevitably prejudicial to the plaintiff, in the extreme. A large part of the evidence introduced by the defendant on the trial, and much of the Court's charge to the jury, related to this false issue and necessarily injured the plaintiff's cause with the jury, not only by permitting them to put their verdict for defendant upon this immaterial ground, but also by inflaming them against the plaintiff's case, even on the material issues.

POINT V.

The Court erroneously overruled Plaintiff's demurrer to the second and fourth counterclaims for monies alleged to have been paid to the plaintiff under duress.

That these counterclaims are improper in this replevin action is clear from the provisions of the Alaska Code relating to counterclaims. Those provisions are as follows (Sec. 3422, Alaska Code of Civil Procedure):

"Nature of counterclaim, and how stated. The counterclaim mentioned in this chapter must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:

"First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim.

"Second. In an action arising on contract, any other cause of action arising also in contract, and existing at the commencement of the action."

The briefest examination of these counterclaims clearly shows that they do not fall within the provisions of the above Statute. The gist of these counterclaims is, that long prior to plaintiff's replevin of this equipment, the defendant was forced to pay certain monies to the plaintiff under threats of financial ruin if he did not make such payments. Each counterclaim expressly alleges that "defendant had

not contracted to pay" these sums sought to be recovered (pp. 45, 72). Hence these counterclaims are not causes of action "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim."

The cause of action upon which plaintiff's claim was based was the wrongful detention of plaintiff's property after plaintiff had become entitled to its repossession. This wrongful detention occurred long after the defendant had made the payments, which he sought to recover by these counterclaims, and long after the alleged acts of duress occurred. There was, then, no connection whatsoever between defendant's alleged payments under duress, upon which these counterclaims were based, and defendant's alleged wrongful detention of plaintiff's property, upon which the complaint in this action was based.

True, the complaint in this action asserted rights growing out of the contracts under which the property in question was placed in defendant's possession; but these counterclaims in question do not assert any rights under these contracts. On the contrary, both counterclaims expressly allege that the payments which they sought to recover were sums "which defendant had not contracted to pay" (pp. 45, 72) and hence could not possibly "arise out of the contracts" set forth in the complaint.

Similarly, the second ground of counterclaims provided for in the Statute, quoted above, does not exist here, since this is not "an action arising on contract" nor are these counterclaims actions arising in contract. It is well settled that a replevin action sounds in tort, for the wrongful refusal of the defendant to surrender possession of the

property sought to be replevied, even though plaintiff's right to repossession grows out of the contract between the parties. As said by the Oregon Supreme Court in *McGargar v. Wiley*, 229 Pac. 665, 667-8, in construing identical provisions in the Oregon Statute, and in reversing a judgment for the defendant because of an improper counterclaim:

“As the defendant, until his default in payment, was rightfully in possession of the automobile, it was necessary for the plaintiffs to demand possession of it in order to render his subsequent possession unlawful. After demand and refusal by the defendant to surrender possession of it plaintiffs became entitled to maintain an action in replevin to recover the possession of the automobile. The cause of action alleged in the complaint as the foundation of plaintiff's claim was defendant's wrongful refusal, upon demand, to surrender the possession of the automobile to the plaintiffs, and his subsequent wrongful detention of it. This refusal by defendant and his subsequent detention of the automobile was a clear violation of the legal right of the plaintiffs to the possession of the automobile, and gave to the plaintiffs the clear right to bring an action to recover the possession of it.

“Assuming that the facts alleged in defendant's counterclaim are sufficient to constitute a cause of action in favor of the defendant and against the plaintiff, and that if sustained by proof these allegations would entitle the defendant to recover therefor, the question is, is he entitled to plead these matters, either as a defense or as a counterclaim, to the cause of action alleged in the complaint, or must he seek his remedy by an independent action? It must be obvious that the cause of action for the wrong complained of by the plaintiffs, namely, de-

defendant's wrongful detention of their automobile, is not one arising on contract, but is based on tort, and therefore the defendant is not entitled to allege as a counterclaim in an action brought to recover the possession of the automobile a cause of action arising on contract under either subdivision 1 or 2 of section 74. Hence if entitled to set forth these matters as a counterclaim it can only be for the reason that the cause of action set forth in the counterclaim is one arising out of the transaction set forth in the complaint as the foundation of plaintiffs' claim. The transaction set forth in the complaint as the foundation of plaintiffs' claim is the wrong committed by the defendant in the detention, without legal right, justification, or excuse of plaintiffs' automobile. The transaction set forth in the counterclaim is the alleged wrong committed by the plaintiffs in making false representations and in the breach of a warranty, resulting in damages to the defendant. Between the transaction set forth in the complaint and the transaction set forth in the counterclaim there is no legal connection whatsoever. They are entirely separate and distinct from each other, and the wrongs complained of in the counterclaim do not arise from the transaction alleged in the complaint. They preceded the transaction alleged in the complaint, and are wholly unrelated to it, and hence the matters alleged in the counterclaim do not constitute a counterclaim, within the meaning of the Code."

We, therefore, submit that defendant's second and fourth counterclaims were improper in this action of replevin and that plaintiff's demurrer to these counterclaims was erroneously overruled by the Court.

POINT VI.

The Court erroneously instructed the jury as to the measure of defendant's damages.

The Court instructed the jury that if plaintiff wrongfully replevied the equipment in question, the defendant could recover three separate items of damages therefor: (1) the rental value of the replevied equipment for the unexpired portion of the ten-year license period provided for in the contracts of March 28, 1929; (2) the profits which defendant lost because of plaintiff's removal of the equipment; and (3) the cost of the new equipment with which defendant replaced the equipment removed (Instructions Nos. 8 and 10, pp. 1005-9, 1010-14). In accordance with these instructions, the jury's verdict in favor of the defendant awarded him (1) \$9,000 as the rental value of the equipment in each theatre; (2) \$19,440 for lost profits at Juneau and \$12,320 for lost profits at Ketchikan; and (3) \$2,628.92 the cost of the new equipment installed in each theatre in place of the equipment removed (pp. 113-14).

We submit that these instructions of the Court's were erroneous in the following respects:

A. The jury was permitted to award double damages;

B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectural.

Let us briefly consider these errors in the Court's instructions.

A. The jury was permitted to award double damages.

That a party who has been deprived of the use of property cannot recover both the rental value of that property and the profits that would have been made in the use of the property, is clearly settled. In the "Restatement of the Law of Contracts" by the American Law Institute, the following rules are laid down (Vol. 1, §331, p. 515):

"DEGREE OF CERTAINTY REQUIRED IN ESTABLISHING
THE AMOUNT OF PROFITS AND LOSSES:

"Alternative Methods.

"(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.

"(2) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property." (Italics ours.)

In other words, the recovery of lost profits and the recovery of "rental value" are "alternative methods" of computing damages. To award damages computed by both methods is to allow double damages. In *Woodring v. Winner National Bank*, 227 N. W. 438 (South Dakota Supreme Court), it was expressly held that one who had been deprived of the use of property could not recover both the value of such use (the "rental value") and also the lost profits. The Court said (p. 440):

“According to the testimony on behalf of plaintiffs, they were deprived of possession for 35 days and their average profits would have been \$15 a day. Under the evidence loss of profits did not exceed \$525. The value of the use and occupancy of the premises and tools was said to be \$50 a week. *The profits could only be realized by using the premises and tools, so that it is clear that plaintiffs would not be entitled to recover both for loss of profits and for use and occupancy of the premises and tools.*” (Italics ours.)

Similarly, in *Bowen v. Harris*, 59 S. E. 1044 (North Carolina Supreme Court), it was held, in an action for wrongful seizure of plaintiff’s property, that plaintiff could not recover both lost profits and also the value of the use, or rental value, of the property. The Court said (p. 1047):

“And it may be well here to note that, if the jury should award plaintiff damages on the basis of the profit he could have made during the time his work was necessarily interrupted, he should not have, in addition, the direct damage arising from a fair value for the loss of the use of the teams, because, in the event suggested, the use of the teams is required in making the alleged profit. He can recover for the value of the use of the teams—this is direct damages—but both should not be allowed.”

We, therefore, submit that it was reversible error for the Court to instruct the jury that it could award the defendant his lost profits “in addition to the rental value of the equipment” (pp. 1006-7).

B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectural.

The Court instructed the jury that they could award the defendant "the profits, if any, lost by him from the operation of" his theatres (pp. 1006-7, 1011). The Court also refused plaintiff's requested instruction that "the defendant had failed to prove with definiteness and certainty that he lost any profits" (p. 979). Under these rulings of the Court, the jury rendered a verdict which contained items of damages totaling \$31,760 for "loss of profits to the defendant by reason of the removal of the equipment" (pp. 113, 114).

We submit that the evidence as to profits was so speculative and conjectural that the Court should not have submitted any question of profits to the jury. What was that evidence? Although occupying the larger part of the Record, it may be briefly summarized as follows:

When plaintiff removed its equipment from defendant's theatres, defendant replaced that equipment with other equipment, which, although the best then obtainable, was inferior in sound quality to plaintiff's equipment. During the two years from approximately June 1, 1929 to May 1, 1931, while plaintiff's equipment was in defendant's theatres, defendant operated those theatres at an average monthly profit of \$2,000.52 at Ketchikan and \$864.15 at Juneau. During the period after plaintiff's equipment had been removed, from approximately May 1, 1931 to May 1, 1933, defendant operated those theatres at an average monthly loss of \$187.70 at Ketchikan and \$489.98 at Juneau, whereupon defendant leased both theatres to one Shearer who, shortly thereafter, removed the equipment then in these thea-

tres and replaced it with plaintiff's equipment, similar to that originally installed and subsequently removed by the plaintiff. During the eighteen months immediately following the re-installation of plaintiff's equipment in these theatres, Shearer, the lessee, operated the Ketchikan theatre at an average monthly profit of \$629.70 and the Juneau theatre at an average monthly loss of \$267.62.

In other words, defendant's case for lost profits was this: "My theatres made money in 1929-31, with the use of plaintiff's equipment. They lost money in 1931-33 with the use of other and inferior equipment. Hence my loss of profits was caused by the removal of plaintiff's equipment."

We submit the following contentions, in this connection:

(1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.

(2) Defendant wholly failed to show the amount of such loss, if any, caused by the removal of plaintiff's equipment.

(1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.

It is well settled that lost profits cannot be recovered unless both the fact and the amount of such loss is established by something more than speculation or conjecture. As said by the Circuit Court of Appeals for the Eighth Circuit in *Homestead Co. v. Des Moines Electric Co.*, 248 Fed. 439, 445-6:

"It is true that the general rule is that the expected profits of a commercial business are gener-

ally too remote, speculative, and uncertain to sustain a judgment for their loss. But there is an exception to this rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. *It is true that the proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts, from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.*" (Italics ours.)

The removal of plaintiff's equipment in April, 1931 (pp. 311-15) could not have caused the defendant any loss of profits unless it caused a decrease in the number of persons attending defendant's theatres. Hence, unless there was some evidence tending to show that this decrease was because plaintiff's equipment was no longer there, the court erred in allowing the jury to award the defendant any lost profits. We submit that there was no such evidence and that defendant's own evidence showed that the decrease in attendance at his theatres began prior to the removal of plaintiff's equipment and continued thereafter at substantially the same rate.

Under the evidence, as the case went to the jury, the decrease in attendance at defendant's theatres in May, 1931-33 might have been caused by any one of many equally possible causes, other than the removal of the plaintiff's equipment. Let us enumerate but a few.

(a) The financial and economic depression, of which the Court properly took judicial notice (pp. 1016-17) and which, under the evidence, was at its worst during this period of

1931-33 (pp. 845-6) was, of course, one of the causes of the decrease in attendance at defendant's theatres. There was no evidence, and could have been none, showing that this decrease was not due to the depression or to what extent it was due to other possible causes. The situation is somewhat similar to that in *Willis v. S. M. H. Corporation*, 259 N. Y. 144, where the plaintiff had been employed to solicit new members for a Club under an agreement that he should receive, as compensation, a percentage of the purchase price of stock which he sold to those members. After he had obtained many new members and sold them much stock, he was wrongfully discharged. Meanwhile, the economic depression intervened. The Court held that no recovery for anticipated profits could be had, since the intervening depression, among other things, rendered those profits wholly conjectural. The Court said (pp. 147-8):

“Those damages are purely conjectural. The number of members obtained by the plaintiff before his discharge forms no basis for an inference that thereafter he would have obtained other members who would pay a substantial amount. * * *, *it is impossible to estimate the influence of an intervening economic depression as an obstacle to the solicitation of new members * * **”. (Italics ours.)

The Court accordingly reversed the judgment insofar as it awarded anticipated profits estimated upon the basis of past profits.

(b) Another probable cause of the decrease in attendance at defendant's theatres in May, 1931-33, was the entry of competitors into this field. When defendant installed plaintiff's equipment in his theatres, in 1929, there were no other theatres in Alaska exhibiting talking motion pictures

(p. 469). In January, 1931, however, the Capitol Theatre opened at Juneau under new management, completely renovated, and with new sound equipment (p. 760). In April, 1932, the Revilla Theatre opened at Ketchikan, likewise completely renovated, and with new sound equipment (pp. 842-3). Both these theatres immediately became active competitors of the defendant (pp. 840-1) and made money (pp. 844, 410-29). To say that, notwithstanding this competition, the attendance at defendant's theatres would not have decreased in May, 1931-33, if plaintiff's equipment had remained in them, is plainly against all reason and business experience.

(c) Still another possible cause of the decrease in attendance at defendant's theatres may have been the type of pictures which defendant exhibited in his theatres after plaintiff's equipment was removed, as compared with the pictures which he exhibited before the removal of that equipment. While defendant testified that he always got the "best pictures in the United States" (p. 471), there was no testimony as to the popular appeal or drawing power of the pictures exhibited after the removal of plaintiff's equipment, as compared with those exhibited before. That the chief drawing power of a theatre lies in the particular pictures which it exhibits was admitted by the manager of defendant's theatres (pp. 759-60).

Since the removal of plaintiff's equipment from defendant's theatres was, at most, only one of many equally possible causes of the decreased attendance at those theatres, the Court should not have permitted the jury to guess that such removal did, in fact, cause a decrease in attendance and should have withdrawn all question of lost profits from the jury's consideration.

Not only did defendant fail to prove that the removal of plaintiff's equipment caused the decrease in attendance at his theatres but his own documentary evidence showed the contrary. For instance, in July, 1929, with plaintiff's equipment in defendant's theatres, the box office receipts at Juneau were \$6,308.40 (p. 578). In July, 1930, with plaintiff's equipment still in these theatres, the box office receipts at Juneau dropped to \$4,295.50 (p. 598). In July, 1931, after plaintiff's equipment had been removed, the box office receipts at Juneau were \$2,813.72 (p. 614).

Similarly, at Ketchikan, the box office receipts for July, 1929, with plaintiff's equipment in this theatre, were \$6,234.07 (p. 485); in July, 1930, with plaintiff's equipment still in, the box office receipts dropped to \$4,821.25 (p. 506); in July, 1931, after plaintiff's equipment had been removed, the box office receipts were \$2,957.80 (p. 520).

These figures, taken from defendant's own exhibits at the trial, show that a marked decrease in attendance at defendant's theatres began long before plaintiff's equipment was removed and that such decrease was no greater after the removal than before. Then, what possible basis was there for the Court's permitting the jury to find that the cause of the decrease in attendance at defendant's theatres was the removal of plaintiff's equipment?

Annexed to this brief, as appendices "A" and "B" (p. 54), are tabulations of figures taken from defendant's exhibits and showing comparative box office receipts at these theatres during the entire period in question. These figures show a progressive decline in box office receipts at both theatres in 1930, long before plaintiff's equipment had been removed. Hence the jury's inference, upon which its verdict necessarily rested, that the decline in box office re-

ceipts was caused by the removal of plaintiff's equipment is not only unsupported by any evidence but conflicts with the figures given by the defendant himself, showing that for months after plaintiff's equipment was removed, the decline in box office receipts proceeded at no greater rate than it had already been doing before the removal of such equipment.

Furthermore, defendant's own witnesses not only failed to establish that the removal of plaintiff's equipment caused a decrease in attendance at defendant's theatres but, on the contrary, expressly stated that they continued to attend defendant's theatres after the removal of plaintiff's equipment just as they had done before. Typical of this evidence was the testimony of defendant's witness McKinnon who said (p. 821):

“I live in Juneau; lived in Alaska nearly fifty years; I have known where the Coliseum Theatre was ever since it was built; I attended it during 1929, 1930, 1931, 1932 and 1933; I remember hearing of when the equipment was taken out of that theatre, but I don't remember the date; *I used to go there right along both before and after; maybe once, sometimes twice a week.*” (Italics ours.)

With such testimony by defendant's own witnesses, and with no testimony that anybody ever stayed away from defendant's theatres because plaintiff's equipment was no longer in there, what possible legal basis was there for the jury's guess that the removal of plaintiff's equipment caused the defendant to lose profits which he would have made if plaintiff's equipment had remained?

True, the defendant was allowed to testify, over plaintiff's objection and exception, that the “effect” of the in-

ferior sound equipment used by him, after the removal of plaintiff's equipment, was that he "lost business—two or three thousand dollars a month" (p. 362); but this mere opinion or conclusion of the witness, based upon no facts, was, we submit, erroneously admitted. Furthermore, this conclusion of the defendant's was completely destroyed by his own further testimony that five other theatres of his in Alaska, all equipped with this same "inferior" sound equipment, made a profit during the very period that these theatres at Juneau and Ketchikan were said to be losing money because of this inferior equipment (pp. 471-2).

(2) Defendant wholly failed to show the amount of his loss of profits, if any, caused by the removal of the plaintiff's equipment.

Let us now assume, for argument's sake, that the removal of plaintiff's equipment did cause the defendant *some* loss of profits. There still remains, however, the question whether there was any evidence sufficient to permit the jury to estimate the *amount* of those lost profits. It is well settled that there must be evidence, not only of the *fact* of loss, but also of the *amount* of such loss. As said in *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98 (8th C. C. A.):

"* * * the loss of profits from the destruction or interruption of an established business may be recovered *where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was*" (Italics ours).

To the same effect is *Homestead Co. v. Des Moines Electric Co.*, 248 Fed. 439, in which the Court (8th C. C. A.) said (p. 446):

“It is true that the proof must pass the realm of conjecture, speculation or opinion not founded on facts and must consist of actual facts, from which a reasonably accurate conclusion regarding *the cause and the amount* of the loss can be logically and rationally drawn” (Italics ours).

Was the amount of the jury's verdict for lost profits (\$19,440 for Juneau (p. 113) and \$12,320 for Ketchikan, p. 114) based upon any evidence of amount which was not mere speculation? The only evidence of such amount was the average monthly profits during the two years while plaintiff's equipment was in defendant's theatres and the average monthly losses during the two years after plaintiff's equipment had been removed (pp. 791-6). This evidence was, we submit, wholly insufficient to permit the jury to render any verdict for lost profits, since defendant's business of exhibiting talking motion pictures (which had only just been invented) was new and fluctuated so widely over the short period in question that it was wholly impossible to estimate future profits upon the basis of past profits, especially in view of the intervening depression.

At the time of the removal of plaintiff's equipment, in April, 1931, defendant's business of exhibiting talking motion pictures was less than two years old (pp. 318-19). At first, he had no competition, his theatres being the only ones in all Alaska exhibiting talking motion pictures (p. 469). Apparently, he encountered no serious competition until the opening of the Capitol Theatre at Juneau on January 15, 1931 (p. 760) near the end of this two-year period. Obviously, the profits made during this period of less than two years were no evidence upon which to base any estimate of future profits to be made, if at all, under fundamentally different and adverse conditions. As said

by Judge Wilbur, while on the Supreme Court of California, in *Friedman v. McKay Leather Co.*, 178 Pac. 139, where a discharged sales agent sought to recover lost profits on future sales based upon the amount of his past sales for only a few months (p. 140):

“In the instant case, as to the damage suffered by the plaintiffs by reason of the refusal to further recognize them as agents, *the profits to be realized as commissions on purely suppositive sales were under the circumstances too speculative to justify a recovery.*” (Italics ours.)

Under the authorities, evidence of past profits is no evidence at all of future profits unless the business in question is a long-established one, with comparatively stable and uniform earnings over a long period of time. As said in the leading case of *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98:

“* * * hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss * * *. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an *established business* may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a *long-established business* generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derived from it *for a long time before*, and for the time during the interruption of which he complained” (Italics ours).

In other words, it is only the past profits of an old and established business, with relatively stable and uniform income and expenses over a long period of years, that can form a fair basis for estimating what profits such a business will make in the future; but to attempt to say what a talking motion picture theatre, exploiting a new invention, will make in the future, on the basis of what it made during its first two years, under exceptional conditions and virtually without competition, is nothing but the wildest speculation.

It is only necessary to glance at the tabulation of the box office receipts for these theatres during the period in question (Appendices "A" and "B", annexed hereto), to see that the fluctuations in this business were so extreme that the rule of estimating future profits of a long-established business upon the basis of past profits is wholly inapplicable. As said in the "Restatement of the Law of Contracts" by the American Law Institute (Vol. I, §331, p. 517):

"If the defendant's breach has prevented the plaintiff from carrying on a well-established business, the amount of profits thereby prevented is often capable of proof with reasonable certainty. On the basis of its past history, a reasonable prediction can be made as to its future. *This may not be the case, however, if the business is one that is subject to great fluctuations either in volume or in the cost of production or the value of the product.*" (Italics ours.)

If confirmation were needed that the jury should not have been permitted to indulge its imagination as to the amount of defendant's lost profits, without the guidance of any reliable evidence of those profits, it is readily found

in the amazingly confused result reached by the jury. Although the only figures of lost profits given by the defendant showed a much larger loss at Ketchikan than at Juneau, the jury's verdict gave a much larger amount for lost profits at Juneau than at Ketchikan! Defendant's figures for his average monthly loss of profits at Ketchikan were \$2,188.22 (p. 792); his figures for average monthly loss of profits at Juneau were \$1,354.13 (p. 796); thus making a total loss of profits at Juneau of \$28,888.10 (p. 796) and a total loss of profits at Ketchikan of \$44,952.26 (p. 792). Yet the jury, by some wholly mysterious process of calculation based on no evidence whatsoever, arrived at the figure of \$19,440 for lost profits at Juneau (p. 113) and \$12,320 for lost profits at Ketchikan (p. 114).

Could any case, better than the case at bar, illustrate the injustice of allowing a jury to mulct a party in large damages based, not on facts and reason, but on speculation and conjecture?

Conclusion.

Because of the serious errors committed by the Trial Court, the judgment appealed from should be reversed.

Respectfully submitted,

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Appendix "A".

BOX OFFICE RECEIPTS—JUNEAU.

	1929	1930	1931	1932	1933	1934
Jan.	\$4,633.35	\$3,347.41	\$2,257.17	\$2,035.70	\$1,727.05
Feb. ....	.....	3,757.91	3,078.68	2,468.16	2,071.55	1,732.80
Mar. ....	.....	3,674.55	3,059.95	2,075.55	1,832.50	1,994.60
Apr. ....	.....	4,991.35	3,042.83	2,228.26	1,759.69	2,287.20
May ....	.....	4,324.10	2,797.23	2,119.23	1,131.40	2,229.30
June	\$4,025.00	4,219.28	2,656.35	2,337.95	451.05	.....
July	6,308.40	4,295.50	2,813.72	1,984.28	1,580.25	.....
Aug.	5,547.15	4,458.06	3,151.50	2,431.46	1,472.85	.....
Sept.	5,393.35	4,955.15	2,765.06	2,044.95	1,793.80	.....
Oct.	5,501.71	4,861.79	2,828.10	2,857.10	1,605.45	.....
Nov.	6,068.02	3,907.90	2,873.25	2,244.60	1,899.15	2,317.95
Dec.	4,985.99	5,517.55	2,458.74	2,330.75	1,297.10	2,461.40

Appendix "B".

BOX OFFICE RECEIPTS—KETCHIKAN.

	1929	1930	1931	1932	1933	1934
Jan. ....	.....	\$4,462.30	\$3,290.35	\$ 977.84	\$1,004.68	\$ 876.30
Feb. ....	.....	3,942.70	3,059.05	1,428.90	988.30	1,258.61
Mar. ....	.....	4,310.35	3,422.00	1,414.75	695.05	2,811.61
Apr. ....	.....	4,727.70	2,987.15	1,491.10	634.79	2,321.30
May ....	.....	4,848.35	2,741.60	1,193.90	85.60	2,696.05
June ....	.....	4,504.05	2,877.05	733.35	2.50	.....
July	\$6,234.07	4,821.25	2,957.80	1,047.63	1,142.78	.....
Aug.	7,519.70	4,365.35	2,853.20	1,192.67	988.23	.....
Sept.	6,682.75	5,625.75	2,966.30	1,387.20	2,397.82	.....
Oct.	7,209.70	4,613.00	2,607.40	1,784.13	2,369.90	.....
Nov.	5,705.85	3,741.25	2,312.00	1,244.10	1,858.30	3,681.15
Dec.	4,314.20	2,813.15	1,438.35	1,034.95	666.71	3,170.76

The above figures are compiled from defendant's exhibits. Plaintiff's equipment was installed at Juneau on May 20, 1929 and at Ketchikan in the middle of June, 1929 (pp. 318-19). Plaintiff's equipment was replevied at Juneau on April 20, 1931 (p. 314) and at Ketchikan on April 28, 1931 (p. 311).

